85-1872

Supreme Court, U.S.
FILED
FEB 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES C. COOK

Petitioner

v.

PETER KIEWIT SON'S COMPANY, et al.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

Charles C. Cook
5956 Cherry Glen Rd.
Vacaville, Calif. 95688
Petitioner
Pro Se

27 pp
Gilbert

QUESTIONS PRESENTED

1. The underlining subject matter at issue in Case No. CIV. S-83-877-MLS and Case No. CIV. S-83-1606-RAR is the collection of income taxes pursuant to the XVI Amendment to the United States Constitution. Was the certification of ratification of the XVI Amendment fraudlent and therefore, void and of no effect ?

2. Petitioner filed newly discovered evidence showing that the XVI Amendment to the United States Constitution was never lawfully ratified. Did the Court error by refusing to address and rule on that question ?

3. The United States District Court below ruled that it lacked subject matter Jurisdiction to hear Case No. CIV S-83-877-MLS. In view of the Court's admission of lack of jurisdiction, did said Court

error by denying remand of the case to State Court upon the demand of the Petitioner ?

4. The United States District Court below ruled that it lacked Subject Matter Jurisdiction to hear Case No. CIV. S-83-1606-RAR and there upon dismissed the said action. Did said Court error by issuing writs and injunctions subsequent to that dismissal?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER, Charles C. Cook, a freeman, white, and of legal age, comes before this Honorable Court to claim all of his Inalienable Rights under the United

States Constitution, and the first Ten Amendments. He petitions herein for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, which failed to address the definitive issues presented to them of the fraudulent certification of the Sixteenth Amendment and jurisdiction of the District Court.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed October 31, 1985, affirmed in part and reversed in part, the appeal from the United States District Court for the Eastern District of California. The Honorable Raul A. Ramirez, District Judge, Presiding, The Honorable Milton L. Schwartz, District Judge, Presiding; Argued and Submitted - August 13, 1985;

Decided October 31, 1985.

Before: NORRIS and REINHARDT, Circuit Judges, and Wm. J. Jameson, District Judge.

//////////////////////

JURISDICTION

.....

The Opinion and Order appealed from was filed October 31, 1985. The Order of the United States Ninth Circuit Court of Appeals denying petition for rehearing was made on November 26, 1985. The jurisdiction of this Court is invoked under 28 U.S.C., Sectons 1252 and 1254 (1).

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CONSTITUTIONAL PROVISIONS INVOLVED

.....

ARTICLE V

The congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, Shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the

several States, or by conventions in three-fourths thereof,as the one or the other mode of ratification may be proposed by the congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article: and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

.....

AMENDMENT XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

//////////////////////

STATEMENT OF THE CASE

On 5/2/83, Petitioner, Charles Cook filed, in Superior Court of the State of California in and for the County of Solano a civil action for breach of contract against his employer, Peter Kiewit & Son, Co. identified as Case No. 84492. In this action the trial attorney, Tax Division, of the Department of Justice filed a brief as amicus curiae. This action was

dismissed.

On 6/23/83, Petitioner, Charles Cook filed a new civil action for breach of contract against the said Peter Kiewit & Sons, Co. and added certain other respondents. This action was again filed in the said Superior Court and was identified Case No. 84882.

On 8/4/83, one of the respondents in the said Case No. 84882 presented to the court a motion for removal to the respondent's court. This case was thereupon identified as Case No. Civ. S-83-877-MLS. The said Charles Cook, as Petitioner, objected to the removal and requested that the said case be remanded to State Court from whence it had been removed. Instead, the said case was simply dismissed for lack of subject matter jurisdiction.

On 12/27/84, the said Charles Cook, who is petitioner herein brought Case No.

Civ. S-83-1606-RAR against the same respondents with additional respondents added, which case is here under appeal. Respondent Court herein determined that it did not possess subject matter jurisdiction to hear the said case Civ. S-83-1606-RAR, dismissed the said case, expunged and dissolved all liens connected therewith and issued an injunction purportedly prohibiting the said petitioner Charles Cook from "filing or attempting to file, and from otherwise prosecuting any complaint, claim or action arising out of the same facts as those contended in the aforesaid State and Federal actions and from filing or attempting to file in any court or recorder's office located in this judicial district any purported lien, lis pendens notice, etc."

On 3/19/84, Petitioner, Charles Cook moved Respondent Court to vacate the said

order and to prove its jurisdiction to act further in the said case after disclaiming jurisdiction to hear and to decide it, and to state DEFINITIVELY WHETHER SUCH JURIS-DICTION ARISES IN COMMON LAW OR ADMIRALTY. Appellant Cook, the moving party in said motion to vacate, did not, however, oppose the dismissal of the said case nor the dissolution of liens, lis pendens notices, etc., but instead stipulated to them.

On 4/23/84, the respondent Court heard the said motion and stated that it had no certain knowledge concerning the jurisdictional questions raised therin and, purely for the sake of appeal, ruled that Title 28 U.S.C. 1651 is the source of the court's power to issue writs and injunctions even after the court has determined that it possesses no jurisdiction to hear and decide a particular cause.

On 4/30/84, Petitioner Cook filed premature notice of appeal believing that Respondent Court had so suggested.

On 6/6/84, judgement was entered.

On 6/15/84, Petitioner Cook filed a "New Notice of Appeal" with the United States District Court for the Eastern District of California in case CIV. S-83-1606-RAR / C.A. # 85-2165

On 10/1/84, Order, Granted Appellees (Government) extension to file brief. C.A. #84-2165 / D.C.# CIV. S-83-1606-RAR.

On 10/30/84, Order, Granted Appellees, Peter Kiewit Son's Co. et al., extension of time to file brief. C.A.# 84-2165 /D.C.# CIV, S-83-1606-RAR.

On 11/19/84, Order, Granted Appellant extension of time to file reply brief. C.A. # 84-2165 / /D.C. # CIV. S-83-1606-RAR.

On 2/1/85, Appellant filed "Notice of Appeal", D.C. # CIV. S-83-877-MLS / C.A. # 85-1649.

On 3/6/85, Hearing Calendar Notice, for oral hearing on April 8, 1985. C.A. # 84-2165 / D.C. # CIV. S-83-1606-RAR.

On 3/22/85, Received, Appellants "Statement of Related Cases and Opposition to Statement of Solano County Appellees "C.A. # 84-2165 / D.C. # CIV. S-83-1606-RAR.

On 4/2/85, Order, Case removed from San Francisco Calendar for April 8, 1985. C.A. # 84-2165 / D.C. # CIV. S-83-1606-RAR.

On 5/23/85, Order, granted Federal Appellee Meuwissen extension of time to file brief. C.A. # 85-1649 / D.C. # CIV. S-83-877-MLS

On 6/5/85, Appellant "Oppostiton to

Consolidation of Appeals". C.A. # 85-1649 and C.A. # 84-2165.

On 6/18/85, Order granted Appellant extension of time to file answering brief, C.A. # 85-1649 / D.C. # CIV. S-83-877-MLS.

On 6/29/85, Order, granting Appellees motion to consolidate appeals for oral arguments. C.A. # 84-2165 and C.A. # 85-1649.

On 7/13/85, Oral argument presented in Ninth Circuit Court of Appeals. C.A. # 85-1649 and C.A. # 84-2165.

On 10 31/85, Opinion, of the United States Court of Appeals for the Ninth Circuit. C.A. # 85-1649 and C.A. # 84-2165. (Exhibit "A", appendix, separately presented.)

On 11/11/85, Appellant "Petition for Rehearing" C.A.# 85-1649 and C.A. # 84-2165. (Exhibit "B", appendix, separately

presented)

On 11/26/85, Order, denying the petition for rehearing. C.A. # 85-1649 and C.A. # 84-2165. (Exhibit "C", appendix, separately presented.)

On 12/13/85, Order on Motion for Stay of Mandate. C.A. # 85-1649 and C.A. #84-2165.

On 12/26/85, Order, granted Appellant an extension of stay of mandate to file brief to United States Supreme Court. C.A. # 85-1649 and C.A. # 84-2165.

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REASONS FOR GRANTING THE WRIT

FRAUD OF THE XIV AMENDMENT

The Petitioner comes to this Honorable Court as a Freeman, though as in chains, to defend his Honor, his personal property , his Sacred and Inalienble Rights. It has come to the attention of

Petitioner that a disturbing pattern is developing in cases where the issue of a FRAUDULENT CERTIFICATION of the ratification of the XVI Amendment to the United States Constitution has been placed before the lower Courts. The issue presented to these Courts is the CRIME OF FRAUD, alledgedly perpetrated by Secretary of State Philander Chase Knox, in his FRAUDUDLENT certification of the ratification of the XVI Amendment.

The Petitioner has been damaged by the FRAUD of the XIV Amendment. Petitioner is not only a white person, but also free, that is to say, without boon, benefit, franchise, privilege, i.e., from Federal or State Governments. Requiring no benefits or privileges. Petitioner has waived no rights whatsoever where the governments might take action upon the Petitioner. And Petitioner has

produced no evidence of any waiver of rights contrary to Respondents claims. Petitioners protection of rights existin in the Original United States Constitution, its Original Bill of Rights, and the Original California Constitution.

And it is evident by the abuses of the bureaucratic officials, public servants, officials, public servants, and certain officers of the courts. under color of law, that their intent is to perpetuate the greatest FRAUD in the history of this Nation. Though Petitioner comes to this Honorable Court alone to defend his Ancient and Inalienable Rights as only a Freeman can, he is aware of approximately twenty million, to an estimated forty million other concerned United States Citizens, who believe in our court system, and in the basic and sound principles outlined in our United States Constitu-

tion, that is to protect the citizens from governmental abuses. The FRAUDLENT XVI AMENDMENT is being masqueraded under the color of law, to take from the United States Citizens their personal property and their Ancient and Inalienable Rights. The Petitioner comes to this Honorable Court to prove that the XVI AMENDMENT IS A FRAUD, and to have this court declare the XVI Amendment null and void. And to protect the Petitioners Ancient and Inalienable Rights.

Petitioner has been made further aware that with the judicial branch rests the final decision as to whether an act of Congress is constitutional. In the case of McCulloch v. Maryland the Supreme Court said:

> "Should Congress, in the execution of its powers adopt measures which are prohibited by the Constitution, or should Congress under the

> pretext of executing its powers pass laws for the accomplishment of objects not entrusted to the Government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."
>
> McCulloch v. Maryland, 4 Wheat. 316.

And in the case of Butler v. United States, holding the Agricultural Adjustment Act unconstitutional, the Supreme Court said:

> "When an act of Congress is appropriately challenged in the courts as not conforming to the Constitutional mandate, the judicial branch of the Government has only one duty--to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."
>
> Butler v. United States, 297 U.S. 1.

Petitioner has found from the amount of evidence to support the charges of the FRAUD of the XVI Amendment, that the documentation, case cites, and other

materials are far too voluminous to include in this petition, and have been presented separately in an appendix for the convenience of this court, in exhibit form.

The best example of the FRAUDLENT XVI AMENDMENT is reproduced from the archives of the State of Kentucky from their Senate journal, (see exhibit "D", appendix separately presented)

Petitioner herein presents documentation from the national archives on the Ratification of the XVI Amendment. Petitioner will not speculate on the reasons why Secretary of State, Philander C. Knox FRAUDLENTLY CERTIFIED THE XVI AMENDMENT. Petitioner only shows that the ACT OF FRAUD was committed. This documentation is presented as Exhibit "E", (appendix separately presented).

Petitioner, through his research and general search of information as to the requirements for ratification of Amendments to the U.S. Constitution, as delineated in Article V of the U.S. Constitution, has aquired so much documentation that the table of cases, statutes and other authorities requires seven pages alone to list, and are too voluminous to include in this petition. For the convenience of this Honorable Court they have been listed as Exhibit "F", (appendix separately presented), which will show the XVI Amendment to read: " Congress shall have power to ____ and collect taxes on _ _____ from whatever derived without ___ _ apportionment among the several States and ___ __ __ census ____ ____ ".

Petitioner would respectfully remind this Honorable Court of Dodge v. Woolsey, from page 348;

"....The same article declares that no amendment, which might be made prior to the year 1808, should, in any manner, affect the first and fourth clauses in the ninth section of the first article, and that no State, without its consent, shall be deprived of its equal suffrage in the senate.The first being a temporary disability to amend, and the other two permanent and unalterable exceptions to the power of amendment.

Now, whether such a supremacy of the constitution, with its limitations in the particulars just mentioned, and with the further restriction laid by the people upon themselves, and for themselves, asto the modes of amendment, be rightor wrong politically, no one can denythat the constitution is supreme, as has been stated, and that the statement IS IN EXACT CONFORMITY WITH IT."
(emphasis added)

Dodge v. Woolsey,(1856)
18 How. (US) 331.

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LACK OF SUBJECT MATTER JURISDICTION

Once the District Court has determined that it lacks subject matter jurisdiction it could only remand the case back

to the State Court.

Judges Schwartz and Ramirez clearly stated that they did not have subject matter jurisdiction and Petitioner did not and has not waived the subject matter of the litigation.

> "Waiver of Constitutinal Rights not only must be voluntary, but must be knowing intelligent acts done with sufficient awareness of the relevant circumstance and likely consequence."
> Brady v. U.S., 379 US 742, 748.

Judges Schwartz and Ramirez claim of 28 U.S.C., Sec. 1651 can only be used IF THEY HAVE A JURISDICTION IN THE LITIGATION, which they DENIED they had. Without Sec. 1651 the substantiality doctrine is moot, as assumed jurisdiction foreign to the litigation is void.

> ....."But the lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, and the district court should, therefore, have declined sua sponte, to proceed in the cause."
> United States v. Corrick, 298 U.S. 435.

//////////////////////

CONCLUSION

For the reasons outlined above, Petitioner requests that this most Honorable Court grant His Petition for Writ of Certiorari, or in the alternative, declare the XVI Amendment to the United States Constitution null and void, and that the Opinion and Order of the United States Court of Appeal for the Ninth Circuit, be summarily reversed, or such other further relief as this Honorable Court may deem appropiate.

RESPECTFULLY SUBMITTED this 31st. day of March 1986.

CHARLES C. COOK
5956 Cherry Glen Rd.
Vacaville, Ca. 95688

Petitioner
Pro Se

DECLARATION

I, CHARLES C. COOK, declare that I am the Petitioner in the foregoing action, that I have read the contents thereof, that they are true to the best of my knowledge except those allegations based on informaton and belief, and as to those, I believe them to be true.

DATED: March 31 , 1986.

/s/ Charles C. Cook
CHARLES C. COOK, PETITIONER
Pro Se.

//////////////////////

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail, first-class postage prepaid to:

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DATED: April 3, 1985

/s/ Carmella M. Kosar
Carmella M. Kosar

LIST OF PARTIES TO THE PROCEEDING

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CLERICAL CORRECTIONS : COOK v. KIEWIT, ET AL., as of May 6, 1986.
"Petition was returned on March 14, 1986, retyped by March 31, 1986---Mailed on April 3, 1986 to United States Supreme Court."

PETITION FOR WRIT OF CERTIORARI

Page 14
Line 20 'inalienble' to 'inalienable'.
Page 21.
Line 21 "asto' to 'as to'.
Line 22 'rightor' to 'right to'.
Line 23 'denythat' to 'deny that'

APPENDICES TO:
PETITION FOR WRIT OF CERTIORARI

Page 4A.
Line 1 'actgions' to 'actions'
Page 6A.
Line 20 'immujnity' to 'immunity'
Page 7A.
Line 18 'forun' to 'found'
Page 10A.
Line 15 'anf' to 'and'
Page 11A.
Line 1 'enjined" to 'enjoined'
Page 19A.
Line 13 'up9on' to 'up on'
Page 5B.
Line 1 'dertification' to 'certification'
Line 4 'the' to 'The'
Line 14 'privat' to 'private'
Line 17 'lthe' to 'the'
Line 19 'Clifornia' to California"
Page 7B.
Line 9 'toemply' to " to imply'
Line 14 'anyh' to any'
Line 15 'rrights' to 'rights'
Page 8B.
Line 9 'p;resented' to 'presented'

CLERICAL CORRECTIONS:
COOK v. KIEWIT, ET AL.

Page 10B.
Line 12 'tria' to 'trial'
'cound' to 'could'
Line 19 'p;eers' to 'peers'
Page 12B.
Line 10 'pap;ers' to 'papers'
Page 13B.
Line 7 'sppellees' to 'appellees'
Page 14B.
Line 16 'Alsom' to 'Also'
'/appellant' to 'appellant'
Line 18 'njullity' to 'nullity'
Page 15B.
Line 4 'RiverS.' to 'River S.'
line 14 'Sstate' to State'
Page 16B.
Line 20 'ction' to 'action'
Page 18B.
Line 3 'intervntion' to 'intervention'
Page 19B.
Line 22 'sppellant' to 'appellant'
Page 20B.
Line 21 'Procxess' to 'Process'
Page 24B.
Line 24 'werved' to 'served'
Page 30B.
Line 9 'tnereof' to 'thereof'
Page 34B.
Line 2 'dorporation' to 'corporation'
Line 13 'tradesan' to 'tradesman'
Page 39B.
Line 22 'ellegal' to 'illegal'
Page 40B.
Line 10 'sle' to 'sole'
Line 13 'fiolation' to 'violation'

CLERICAL CORRECTIONS:
COOK v. KIEWIT, ET AL.

NOTE: Two pages have been improperly numbered out of sequance the pages are shown as 44B and 42B, whereas they shoud be in sequance of 43B and 44B.

Page 42B.
Line 17 'p;roper' to 'proper'
Page 45B.
Line 8 'inmproper' to 'improper'
Page 49B.
Line 10 'cort' to 'court'
Line 14 'lAction' to Action'
'Remedyu' to 'Remedy'
Page 1D.
Line 1 'followiong' to 'following'
Line 19 'proision' to ' provision'
'Senat' to Senate'
Page 3D.
Line 9 'intnents' to 'intents'
Page 4D.
Line 10 'aurhentic' to authentic'
Line 16 'andnays' to ' and nays'
Page 5D.
Line 3 'after the name of Brown, R. B. add the name of "Graham, J. C.".
Line 16 'Mewcomb, H. D.' to 'Newcomb, H. D.'
Page 3E.
Line 17 'teh' to 'the'
Page 4E.
Line 14 'Resoutio9n' to 'Resolution'
'peoposing' to 'proposing'
Page 28 F.
Line 13 'lthat' to 'that'
Page 48F.
Line 10 'Comgress' to 'Congress'

CLERICAL CORRECTIONS:
COOK v. KIEWIT, ET AL.

Page 54 F.
Line 11 'Congrss' to Congress'
Page 58F.
Line 23 'manerering' to 'maneuvering'
Page 59F.
Line 3 'knowlegeable' to 'knowledgeable'
Page 68F.
Line 4. 'sction' to 'section'
Page 71F.
Line 13 'ssubmitting ' to 'submitting'
Page 82F.
Line 16 'Nixion' to 'Nixon"

DECLARATION

I, CHARLES C. COOK, declare that I am the Petitioner in the foregoing action, that I have read the contents thereof, that they are true to the best of my knowledge except those allegations based on information and belief, and as to those, I blieve them to be true.

DATED; MAY 6, 1986 , at Vacaville, California.

/s/ Charles C. Cook
CHARLES C. COOK / PETITIONER
Pro Se.

85 - 1872

Supreme Court, U.S.
FILED
FEB 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES C. COOK

Petitioner

v.

PETER KIEWIT SON'S COMPANY, et al.

Respondents

APPENDICES TO:

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

Charles C. Cook
5956 Cherry Glen Rd.
Vacaville, Ca. 95688
Petitioner
Pro Se.

187pp

APPENDIX

TABLE OF CONTENTS

EXHIBIT:

"A"...Opinion, of the United States Court of Appeals for the Ninth Circuit. C. A. # 85-1649 and C. A. # 84-2165.

"B"...Appellant, "Petition for rehearing". C. A. # 85-1649 and C. A. # 84-2165.

"C"..."Order", denying the petition for rehearing.

"D"...Certified copies, from the "Journal of the Senate", which is on deposit at the Division of Archives and Records Management, Commonwealth of Kentucky.

"E"...Certified copies, from the "National Archives and Records Administration", The National Archives, Washington, D. C.

"F"...Cases, other Authority, with cites proving that the XVI Amendment to the United States Constitution is Void.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES C. COOK, and others similarly situtated, DOES I -XXX, Plaintiff-Appellant, v. PETER KIEWIT SONS CO., SOUTHERN ELECTRICAL CONTRACTORS) INC.,KIEWIT-SOUTHERN (A JOINT VENTURE), RODNEY D. BECK, BRUCE MORSE, MIKE ROONEY, RICH NABOR, DAVID COHEE, DON KELSEY, CLINT GWYNN,III, JUSTIN M. ROACH, LARRY MEUWISSEN, DWIGHT C. ELY, MICHAEL MCINNIS, Defendants-Appellees.	C.A. No. 85-1649 D.C.# CIV S-83-877-MLS "FILED OCT. 31, 1985"
CHARLES C. COOK, and others similarly situtated, DOES I -XXX, Plaintiff-Appellant. v. PETER KIEWIT SONS, SOURHTERN ELECTRICAL CONTRACTORS, KIEWIT-SOUTHERN (A JOINT VENTURE), RODNEY C. BECK, BRUCE MORSE, MIKE ROONEY, RICK NABOR, DAVID CHOEE, DON DELSEY, CLINT GWYNN,III JUSTIN M. ROACH, LARRY MEUWISSEN, DWIGHT C. ELY, MICHAEL MCINNIS, THOMAS H.	C.A. No. 84-2165 D.C. # CIV S -83-1606-RAR O P I N I O N - - - - - - - -

GORDINIER, KATHLEEN T. GUNN,)
DONALD B. AYER, YOSHINORI H.)
T. HIMEL, GREG CIAPPOINI,)
NEIL CRAWFORD, CAROL TAM-)
BARELLI, MILTON L. SCHWARTZ,)
and DOES 26 through 50,)
)
Defendants-Appellees.)
)

Appeal from the United States
District Court for the Eastern
District of California
The Honorable Milton L. Schwartz, District Judge, Presiding. The Honorable Raul A. Ramirez, District Judge, Presiding.
Argued and Submitted-August 13, 1985
Decided Oct. 31, 1985.

Before: NORRIS and REINHARDT, Circuit Judges, and JAMESON,* District Judge.

* The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

JAMESON, District Judge:

This is a consolidated appeal of judgments of dismissal in two actions instituted by Charles C. Cook, arising from Cook's asttempt ot avoid the withholding of federal income taxes from his

wages.[1] In each case the district court dismissed the action with prrejudice, awarded attorney fees to the defendants, released liens and lis pendens documents filed by Cook, and enjoined Cook from further litigating any issues raised by him in htese actions and from filing further lien or other encumbances against property belonging to the defendants.[2]

Cook raises a number of interrelated ssues on appeal. His primary contention in each case is the once the district court declared that it lacked subject matter jurisdiction, it lacked jurisdiction to award costs and atrtorney fees and to enjoin him from relitigating the issues

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1. Cook instituted three suits. This appeal involves the second (Cook II) and third (Cook III) actions.

2. In Cook II JUdge Schwartz, ordered a release of all present and future liens, In Cook III, Judge Ramirez actually enjoined cook from filing such liens.

raised on these actgions. We affirm in part and reverse in part.

I. Facts and Proceedings Below

Cook was one of 750 to 1,000 employees of kiewit-Southern, a joint venture of Peter kiewit & Sons, Inc. and Sorthern Electrical Contractors, Inc., who claimed exemption form income tax withholding on FORM W-4. The IRS reviewed Cook's claim of exemption and, concluding that it lack merit, ordered his employer to begin withholding at a specified rate. The employer complied with the order.

A. Cook I

Cook first sued his employer and some of its employees for breach of the employmnet contract in Superior Court, Solano County, California (Cook I). Within a few days after filing the complaint, Cook recorded a number of documents which

placed liens and other impediments upon personal and real property of the Kiewit defendants and other personal named in the suit. The Kiewit defendants demurred, seeking dississal. The United States. represented by attorney Larry Meuwissen, submitted a amicus curiae brief supporting dismissal. Cook did not oppose dismissal, and the Solano cournty Sup[erior Court (Judge Dwight C. Ely) dismised the action on June 16, 1983.

Judge Ely's dismissal was vacated, and on rehearing Superior Court Judge Michael McInis again dismissed the action on July 15, 1983. He found the complaint did not state a cause of action and that sugject matter juricdiction was lacking. He declared the lien type documents devoid of legal effect, enjoined Cook from filing anyh more such documents in Solano County, and awarded attorney fees. Cook did not

appeal this judgment.

B. Cook II

On June 23, 1983, Cook filed a complaint in Cook II, realleging the claims of Cook I and adding claims sounding in defamation and trepass. Cook also added as defendants counsel for Kiewit defendants in Cook I, Judge ely, Judge McInnis, Larry Meuwissen, the Solano Cosunty Clerk, a Deputy clerk, and an IRS official. Since an officer of the United States was named as a defendant, the case was removed to the United States District Court for the Eastern District of California. The case was assigned to Judge Milton Schwartz.

The defendants moved for dismissal or summary judgment in Cook II, on the grounds, inter alia, of res judicata, collateral estoppel, official immujnity

and lack of proper service of process. In addition, they contended that the suit was frivolous and brougth in bad faith.

Following a hearing and oral argument on November 18, 1983, Judge Schwartz orally indicated that he would grant the defendants' motions. On December 22, 1983 however, before Judge Schwartz had entered a written order, he was named as a defendant in Cook III. Consequently Judge Schwartz was unable to file a written order until July 16, 1984, after Cook III had been dismissed byn Judge Ramirez.

In his written order, Judge Schwartz found that the state court disposition of Cook I was res judicata as to the Kiewit defendants and therefore barred relitigation as to them. He forun further that the remaining claims were "frivolous on their face" and dismissed the claims against "the defense counsel category...

because of absolute ilmmunity for judicial acts under Bradley v. Fisher, 13 Wall. 335, 354 (1872)." Additionally, Judge Schwartz assessed attorney fees against Cook, released all "liens" known or that should become known, and, in a sepatate order, enjoined Cook from relitigating any claim basied on the factual and legal issues adjudicated and dismissed in Cook II).

Cook moved to vacate these orders. He argued in the main that the federal court lacked subject matter jurisdiction. Cook agreed to release all clouds on the title of Meuwissne's property and also agreed to refrain from filing from filing such documents in the futurre on the property of meuwissen, any federal judge, agent of the IRS or United States Attorney. Although the original order dis not mentiion as basis of dismissal lack of

subject matter jurisdiction, Judge Schwartz addressed this issue in his order denying Cook's motion. He concluded, as did Judge Ramirez in Cook III, that

"(t)here (was) ample authority for the court to dismiss this action for lack of subject matter juricdiction on the grounds of insubstanteality." Cook's motion was denied.

C. Cook III

Cook's third case was filed in federal district court. The allegations of the complaint were essentially the same as in Cook II, except for augmenting the list of defendants to include the United States Attorney who removed Cook II to federal Court, The Deputy County Counsel who defended the Superior Court officers, the new counsel for the original defendants, and Judge Scshwartz. Since Judge Wchwartz was named as a defendant in

Cook III, this case was assigned to Judge Ramirez.

Judge Ramirez' written order was filed March 20, 1984. Judge Ramirez did not reach the defendants' asserted grounds for dismissal. Instead, he found lthat "this lawsuit (was) wholly frivolous, insubstanteal and groundless," and concluded that the lawsuit "(was) outside this court's subject matter jurisdiction." He relied on Bell v. Hood, 327 U.S. 678 (1946), and Hagans v. Lavine, 415 U. S. 528, 537-38 (1974). Judge Ramirez ordered the action dismissed for lack of subject matter jurisdiction anf for afailure to state a claim.[3]

Additionally, Judge Ramirez found that Cook had brought Cook III in bad faith and for vexatious purposes.

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3. Because Judge Ramirez found the action frivolous, he dismissed with prejudice.

Judge Ramirez therefore enjined Cook from again judicating any claim based on the same facts as those contended in Cook III, Cook II or in Cook I. He found authority for this injunction in the All Writs Statute, 28 U. S. C. Sec. 1651 and in Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F.2d 11515 (9th Cir. 1983), cert. denied, 104 S. Ct. 1446 (1984). Finally, Judge Ramirez held that all the documents filed by Cook which clouded the title to the defendants' property were nul and void and he therefore ordered them dissolved and expunged. Cook was also enjoined from filing any other such documents based on the facts contended by Cook in Cook III, or in Cook II or in Cook I. Defendants' motion for attorneys' fees and costs were dealt with in a separate order.

Cook moved the court in Cook III to

vacate or to modify its judgment. Cook agreed to release all liens he had placed on the title of Meuwissne's property and stipulated that he would forever refrain from filinf such liens on titles to property of Neuwissen, any federal judge, agent of the IRS or United States Attorney. He argued that once the court determined that it lacked jurisdiction, it was without power to act on defendants' requests for attorney fees and injunctive relief. Judge Ramirez concluded, relying on Wood, 705 F.2d 1515, that the court had power to act as it had and that it had correctly exercised its discretion. The judgement was reaffirmed on June 6,1984.

II. Contentions on Appeal

It is Cook's primary contention in each case that the court, having found that it lacked subject matter jurisdiction, had no power to (1) enjoin

the plaintiff from further litigation or (2) award costs and attorney fees to the defendants. In addition, Cook contends in Cook II that this action was improperly removed and should be remanded to state court; and that court lacked authorlity to expunge the liens he had filed against the defendants' property.[4]

III. Removal of Cook II

We find no merit in Cook's contention that Cook II was improperly removed from state court and shoud be remended. 28 U.S.C. Sec. 1442 (a) (1) provides for the removal to the appropriate federal court of any civil action commenced in a state court against any "officer of the United States or any agency thereof or person

4. As noted above, in each case, following the entry of judgment, Cook Stepulated that he would release the liens from Meuwissen's property and that he would refrain from filing such liens on the property of all federal defendants.

acting under him, for any act under color of such office ...." "The only prerequisite to removal of a civil action under 1442 is that it be brought against a federal officer or agency." IMFC Professional Etc. v. Latin Am. Home Health, 676 F. 2d 152, 156 (5th Cir. 1982). (Emphasis in original). Larry Meuwissen, the attorney representing the United States in filing the amicus curiae brief, was an officer of the United States actin under color of his federal office. Cook II was Properly removed to federal court.

IV. Authority to Enjoin Relitigation and Release Liens

A. Cook II

With respect to Cook II, Judge Schwartz ordered dislmissal because the claims were res judicata as to the Kiewit defendants. no wrongful act was alleged against defense counsel, and the state

court judges could assert the privilege of absolute ammunity. He did not order dismissal for lack of subject matter jurisdiction.[5] In view of the repetitive procedures followed by Cook, Jusge Schwartz did not abuse his discretion in enjoining future litigation of the factual and legal issues involved in Cook II. See 28 U. S. C. Sec. 1651; Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F.2d 1515.[6]

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5. In denying the motion to vacate the order of dismissal Judge Schwartz concluded that there was ample authority to dismiss the action for lack of subject matter on the ground of insubstantiality. He did not, however, dismiss the action on this ground. See discussion of "substantiality doctrine" under Cook III

6. The court in Wood that, "The doctrine of collateral estoppel and res judicata ordinarely provide adequate assurance that one court's resoution of a controversy will be respected by other courts." The court continued; "Nevertheless, under the All Writs Act, 28 U.S.C. Sec. 1651, distr-ict courts do have the power to reinforce the effectof these doctrines by issuing

Judge Schwartz also properly released all liens filed against the defendants. See, e.g. Ryan v. Bilby,, 754 F.2d 1325 (9 th Cir. 1985), where this curt affirmed the release of liens, pursuant to I.R.C. Sec. 7402 (a) (1982), imposed by taxpayers on the property of government officials. See also Stonecipher, v. Bray, 653 F.2d 398 (9th Cir. 1981), holding that an employer's withholding of taxes did not deprive the employee of any constitutional right.

B. Cook III

In Cook III the court found that Cook was seeking to assert claims under 42 U. S. C. Sec. 1983 and Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Judge Ramirez found the law suit "Wholly

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(6.) an injunction against repetitive litigation. (Citing Clinton v. United States, 297 F.2d 899 (9th Cir. 1961)) Id. at 1524.

frivolous, insubstantial and groundless" and "thus outside this court's subject matter jurisdiction." (Citing Bell v. Hood, 327 U. S. 678 (1946) and Hagans v. Lavine, 415 U.S. 528, 537-538 (1974). thus, the Substantiality doctrine could be and was applied.[7]

Under the substantility doctrine, the district court lacks subject matter jurisdiction when the question presented is too insubstantial to consider, Hagans v. Lavine, 415 U.S. 528, 536-39. The Claim must be "so insubstantial, implausibe, foreclosed by prior decisions of this Court or otherwise completely devlid of merit as not to involve, a federal controversy within the jurisdiction of the District Court, whatever may

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7. Because Cook asserted a federal question, jurisdiction was facially conferred, thus allowing Judge Ramirez to apply the substantiality doctrine. See Hagans, 415 U.S. at 538-39

be the ultimate resolution of the federal issues on the merits." Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666 (1974).

A dismissal based on the substantiality doctrine is, in many respects, similar toa dismissal for failure to state a claim. This court, however, had recognized that there exists a threshold difference. Franilin v. Oregon State Welfare Division, 662 F.2d 1337, 1343 (9th Cir. 1981)> Whereas dismissal based on failure to state a claim requires a judgment on the merits and cannot be decided before the court assums jurisdiction, a subvstantiality doctrine dismissal does not operate as a judgment on the and "thus allows a plaintiff the opportunity to seek relief in State Court or to assert a claim for wlhich the federal courts have jurisdiction." Id.

See also Bell, 327 U.S. at 582. Judge Ramirez's dismissal for lack of subject mater jurisdiction, thus, is not a judgment on the merits,[8] and he retained no power to make judgments relating to the merits of the case. Judge Ramirez relied on the All Writs Act, 28 U.S.C. Sec. 1651,

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8. The formal judgment simply stated that judgment was entered for the defendants. In Judge Ramirez's order he stated that defendants' motions were granted "for lack of subject jurisdiction and for failure to state a claim up9on which relief can be granted." Earlier in his order he stated that the defendants'various grounds for dismissal were well taken, but "it will not be necessary to base my judgment" on these grounds of defense and that he found "that this lawsuit is wholly frivolous, insubstantial and groundless. It thus is outside this court's subject matter jurisdiction." In a colloquy with Cook at a hearing on a motion filed by Cook subsequent to the judgment, Judge Ramirez said in part:

> The basis of the dismissal was, in fact, the Constitutional claims were not only insubstantial, but frivolous and basically therefore, there was no Federal Question jurisdiction presented to this Court.

and Wood, 705 F.2d at 1524, supra. Wood, however, permits the court to enjoin repetitive and vexatious litigation only after it had reached a judgment on the merits. Sec. 1651 also requires that an injunction be issued in aid of the curt's juricdiction. Because Judge Ramirez concluded that the court lacked subject matter jurisdiction, he did not reach a judgment on the merits and did not retain litigation of the factual and legal isues in Cook III.

A different situtation is presented with respect to Judge Ramirez's order in cook III enjoining relitigation of the issues in Cook II. "A district court retains jurisdiction to enforce the judgments it [has] enter [ed]." Wood, 705 F.2d at 1524. This court held in Wood that the court retained jurisdiction to enforce the doctrines of res judicata and

collateral estoppel of a final judgment it had previously entered. The court in Wood was able to enjoin repetitive litigation at a later date. Id. This case is complicated by reason of the fact that Cook filed the thired action after Judge Schwartz had ruled orally, but before a written order had bven entered. JudgeRamirez in his order, however, relied on Judge Schwartz's oral ruling, and we conclude that Judge Ramirez retained the jurisdiction to enjoin relitigation of the factual and legal issues of Cook II and correctly enjoined Cook from such relitigation. In any envent, relitigation was properly enjoined by Judge Schwartz both orally and in his subsequent written order. Moreover, the facts allegaed in Cook III are essentially the same as those alleged in Cook II.

There is some confusion and

uncertainty as to Cook's contention on appeal regarding that part of the order in Cook III expunging liens on defendants' property. In his opening brief Cook states that "[q]uestions of whether the court has jurisdiction to lift liens connected with cases in which the Respondent court does not possess subject matter to hear and decide the issues, have been settled by stipulation and are not issues in this appeal." The stipulation, however, refers only to liens on federal defendants' property. Both the federal defendants and the county defendants have interpreted Cook's statement to include liens against the property of all defendants.[9] Under the circumstances we

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9. The brief of the county appellees reads in part: "Mr. COOK, in his opening Brief, identifies two items (item 6 and 7 of his Statement of Issues) as stipulated matters which he claims are not in issue on appeal. These items are not in issue only because Mr. Cook has elected to abide

consider this a reasonable interpretation. moreover, it is of no practical significance, since we affirm the orders entered in Cook II releasing the liens.

V. Award of Attorney Fees

Attorney fees were properly awarded in both Cook II and Cook III, pursuant to Fed. R. Civ. P. 11.[10] Under this rule a

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(9) by the order of the District Court, and not to appeal these issues to the Ninth Circuit court of appeal. There is no stipulation on these issues, but there is an order of the Distrrict Court directing the dismissal of the case and that liens filed by Mr. COOK shall be without force or effect, and shall be remoned."

10. Rule 11 was amended on April 18, 1983, to include sanctions, following the decision of the Supreme Court in Roadway Express, Inc. v. Piper, 447 U.S. 752, 766-67 (1980). The Notes of the Advisory Committee state that the amended rule attempts to expand "the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation." (Citing Roadway Express).

Pleading may not be "interposed for any inproper p;urpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." If a pleading is so interposed the court may award "reasonable expenses incurred because of the filing of the pleading,... including a reasonable attorney's fee."

Judge Schwartz found in Cook II that Cook had filed the action "not to vindicate rights but to multiply proceedings and to put defendants and the courts to needless efforts and expense," and with the purpose of "vexing, harassing and impeding the defendants in the proper performance of their duties under the law." Judge Ramirez, likewise, found in Cook III that cook had filed the lawsuit in "bad faith" and for "vexatious purposes." He stated that the lawsuit "is a carbon copy of Cook's previous lawsuits,

raising the identical cause of action, Cook's adding of new defendants in this lawsuit is an unjustified reprisal against officers of the court and other officials for lawfully exercising their constitutional and statutory duties during the pendency of Cook's previous actions."

In Callow v. Amerace Corp., 681 F.2d 1242, 1243 (9th Cir. 1982), this court affirmed an award of atonrey fees as "an appropriate deterrent to future frivolous suits," concluding that the express finding that Callow acted in bad faith was supported by the record and not clearly erroneous.[11] See also Press v. McNeal, 568 F. Supp. 256, 260 (E.D. Pa. 1983). The award of attorney fees was proper

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11. In Callow, the plaintiff claimed that reserve notes were not valid money, a claim which had been rejected by every court considering the claim. Id. at 1243.

in both cases.

We have considered Cook's other related contentions and find them without merit.[13]

VI. Conclusion

We affirm the judglment of dismissal entered by the district court in Cook II, togeather with the orders injoining Cook from relitigating or attempting to relitigate the factual and legal issues adjudicated and dismissed in Cook II, the releases of all liens against defendants' property, the assesment of costs, and

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12. In may be noted tht in veiw of Cook's financ ial situation each court awarded a very modest fee-$500.00 to each of the three groups of defendants and $500.00 to the United States.

13. In Wood, as here, the plaintiff was a pro se litigant. We have given due consideration to this facrt, as the court did in Wood, 705 F. 2d at 1525.

award of attorney fees. We affirm the judgment of dismissal entered in Cook III, together with those portions of the orders injoining the relitigation of the issues in Cook II, assesing costs, and awarding Attorney fees, but reverse those portions of the order injoining the relitigation of the issues in Cook I and Cook III.[14] We conclude that Cook did not appeal that portion of the order in Cook III expunging the liens against defendants' property.

AFFIRMED IN PART AND REVERSED IN PART.

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14. We recognize that this partial reversal will have no practical effect, since the same issues were raised in Cook I and III as in Cook II, and we are Affirming the orders with respect to Cook II.

UNITED STATES CPIRT OF APPEAL

FOR THE NINTH CIRCUIT

CHARLES C. COOK Plaintiff & Appellant v. PETER KIEWIT SON'S COMPANY et al., Defendants & Appellees	"FILED" NOV. 11, 1985 CA. NO. 85-1649 DC. # CIV S-83-877-MLS CA. NO. 84-2165 DC. # CIV S-83-1606-RAR

PETITION FOR REHEARING
FRAP 40

Appellant herein petitions this court to rehear appellants cases and to direct the Court's attention to the material fact's and law and conflict of law's overlooked by the Honorable Judges Norris and Reinhardt, Circuit Judges and Jameson District Judge. As argued and submitted to the Court on August 13, 1985 and from the decision of October 31, 1985. The appellant request that this court take notice of the following:

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QUESTIONS PRESENTED

1. The fraudulent dertification of the ratification of the XVI Amendment of the United States Constitution.

2. the inalienable right of the appellant to a jury trial in the superior court in the county of Solano, in the State of California.

3. Once any court states to not have subject mattter jurisdiction that court can not assume any jurisdiction.

STATEMENT OF FACTS

The Appellent brought a civil suit against his employer by contract, for a breach of a privat labor contract, as the contract was implied and agreeded to, for an even exchange of a personal property.

The appellent filed in lthe Superior Court of Solano County in the State of Clifornia. As a torts action filed "At

LAW NO. 84492, ACTION AT LAW FOR DAMAGED, (BREACH OF CONTRACT)," Filed May 2, 1983. Appellent intent of case No. 84492 was filed at law with demand for a jury trial. to which appellant has been and is still being denied his right of trial by jury. It has never been the intent of appellant to knowing or otherwise to waive, surrender, forfeit, relinquish or toemply as assumption of any intent of his actions. Appellent has claimed all God give, natural, inalienable and legal rights, to protect his family, property and himself from anyh violation of the forestated rrights and to vindicate those rights. Thought the form of action may not have been standard, the intent of appellant has been only to protect his property and rights. Herein states his arguments.

ARGUMENTS

I.

FRAUD

Appellant herein wishes to bring to this courts attention that FRAUD has been committed against the Appellant and the People of the United States.

Upon discovery of the new evidence, appellant p;resented in "APPELLENTS REPLY BRIEF, C. A. # 85-1649, filed August 2, 1985." The "Memorandun of Law", as addendum to brief # 1 and in addendum to brief #2, the photo copies of the concl-usive and irrefutiable evidence of the certified documentation that proves the ratification of the XVI Amendment to the Constitution fo the United States as being FRAUDLENTLY CERTIFIED by Secretary of State Knox, in 1913. The FRAUD voids any question of federal juricial claim of jurisdiction against appellant by the

alledged claims of the Internal Revenue Service and the United States Department of Justice. As they claim original authority under Title 26 USC, Internal Revenue Codes, for direct taxation, as authorized under claim of authority of the XVI Amendment of the United States Constitution.

Appellent will show the Court his original certificated documents to prove his claim of the FRAUD, if this curt has any doubts of their existence.

Appellent would like to remind this court of the Constructive Notice, dated 7 August 1985, servied on August 11, 1985 and received lAugust 13, 1985 by dertified mail as addressed to: "United States Court of Appeals for the Ninth Circuit and all Judges thereof". Please note Exhibit A. Attached hereto.

II.

APPELLANTS RIGHT TO TRIAL BY JURY

Appellants intent, of his caus of action in Cook v. Kiewit, Case NO. 84492, filed on May 2, 11983, in Solano County, was brought in the belief that under the supremacy clause of the United States Constitution and the California Constitution (see Exhibit B, Page 1, line 19 to 22. That his ancient and inalienable right to a tria by jury cound not be violated under any sham pleading of the appellees.

Appellant felt that he had clearly indicated and demonstrated that he would except nothing less than his God given and inalienable right to a trial by a jury of his p;eers, in a lawful court in Solano County, in the State of California.

Appellant hereby wishes this court to take notice of the following acts of appellants demands of his right to trial by jury as stated from his brief and notices filed in Solano County and the U. S. District Court of Eastern Californai as Follows;

COUNTY OF SOLANO:

Filed May 2, 1983
Exhibit B, page 1 line 19 to line 22
page 2, line 6 to line 21

Filed May 5, 1983
Exhibit C, page 1 `estoppel'

Filed June 23, 1983
Exhibit D, page 1 line 13 to line 17
page 2 line 15 to page 3, line 23.

UNITED STATES DISTRICT COURT OF THE EASTERN DISTRICT OF CALIFORNIA:

Filed October 27, 1983
Exhibit E, page 1, 2 and 3.

Filed December 27, 1983
Exhibit F, page 1, line 22 to page 3, line 16 and page 4, line 3 to line 16.

Appellant wishes this court to take notice tht in case CIV S-83-1606-RAR, that appellant had been denied access to his State Court by the stop order of Judge Miltion L. Schwartz. Appellant had originally intended to file this suit in his State Court. When he attempted to filew his suit with the clerk of the court in Solano County, he was informed that he had been bared from filing any pap;ers in the Superior court. With the intent to vindicate his rights, appellant found that he could file his suit with the clerk of the court for the United States District court, (see Exhibit F) to remand his action to his state courts where he could proceed with his action to have a trial by jury.

The appellant supports his right to jury trial, as appellant has found that the view has been taken, however, that if

the Appellant cause of action is on contract for a definite sum of money, or for the damags ex contractu, and the cause of action is disputed, then there is an absolute right to a jury trial, which cannot be taken away or destroyed by anything which the sppellees might set up in answer, Snell v. Niagara Paper Mills, 193 Ny 433, 86 NE 460. Thus, a mere allegation and prayer for the annulment and cancellation of an instrument suee on in an action at law will not suffice to trun the action into a case for the cognizance of a court of equity, Ross v. McCaldin, 195 Ny 210, 88 NE 50. The appellant claim for damages, and a right to jury trial was raised and may be damanded, Associated Metals & Minerals Corp. v. Dison Chemical & Reserch, Inc. 52 NJ Super 143, 145 A2d 49.

Appellant suit was for the recovery

of money, the action is one at law and triable by jury as a matter of right, Couth Milwaudee Co. V. Murphy, 112 Wis 614,88 NW 583. appellant found that the recivery of money shall be tried by a jury unless a jury trial is waived, Waddell v. State ex rel. Meeks, 235 Ark 293, 357 SW 2d 651.

Further appellant has found that the failure to appeal from an order transfernig a case on the clendar for a trial by the court without jury has been held not to constitute a waivder of the constitutional right to a trial by jury, Allen v. Gray, 201 NY 504 , 94 NE 652. Alsom /appellant is to understand that the constitutional right of jury trial, cannot be made a njullity, destroyed, annulled, obstructed, imparired or restricted by legislation or judicial action, Ex parte Peterson, 253 US 300, 40 S Ct 543, Slocum

v. New York Life Ins. Co. 228 US 364, 33 S Ct. 523. Baader v. State, 201 Ala 76, 77 So 370. State v. Main, 69 Conn 123. Flint RiverS. B. C. v. Roberts, 2 Fla 102.Metropolitan Casualty Ins. Co. v. Huhn, 165 Ga 667. People v. Scornavache, 347 Ill 403. Jackson v. Clark, 152 Miss 731. People v. Mitchell, 266 NY 15. Commonwealth v. hail, 291 Pa 341. Casstevens v. Teaxas & P.R.Co. 119 Tex 456 and Mckinney v. State, 3 Wyo 719.

Appellant has also found out that it cannot be invaded under the guise of legislation for another purpose, Sstate ex rel. La Follette v. Kohler, 200 Wis 518. Bank of State v. Cooper, 10 Tenn (2Yerg) 599, or by such legislation which has such effect in unconstitutional, Saco v. WLentworth, 37 Me 165. Sstate v. Gurney, 37 Me 256 and Bank of State v. Cooper, supa. Also the right to trial by jury is

essential to due process of law, the court will not countenance a denial of the right under statues imposing burdensome conditions or prescribing penalities designedto prevent and discourage trial by jury, Saco v. Wentworth, Supra.

Appellant had found tht a court ay not deny a jury trial slimply because there is no real legal defense to the action and where a jury trial is denied on this ground in an action properl,y triable by a jury, there will be reversible error, Jackson v. General Finance Corp. 208 Okla 44. Oxley v. Sourhtland Life Ins. Co., 159 159 Okla 287. Board of trustees of Fireman's Relief & Pension Fund v. Brooks, 179 Okla 600. Willson v. Federal Tax Co. 176 Okla 90.

It should also be noted that a transfer of an ction from law to equity and trial without a jury, where there is

no ground for jurisdiction in equity, violates the constitutional right to jury trial of questions of fact involved in such action, Berg v. Johnson 139 Ark 243. And that likewise, a statute providing that any cause which at common law is triable by jury shall be tried according to the course of chancery is obnoxious to the constitutional right to jury trial and is void. Kainea v. Dreuger, 30 Hawaii 860. North Pennsylvania Coal Co. v. Snowden, 42 Pa 488. As the Seventh Amendment did not create a right to a jury trial but merely preserved rights then existing at common law. General Tire & Rubber Co. v. Watkins (CA4Md) 331 F 2d 192, 84 S Ct. 1629.

From the very first case Appelllant have never waived his right to jury trial, has the appellant court presume that a jury was waived when the record recites

that the parties came and submitted the cause to the court for trial, without the intervntion of a jury. If doubtful, the waiver of a right to a jury trial will not be presumed or implied by the appellate court. Farmer v. Loofbourrow, 75 Idaho 88.

Appellant still demands his right to trial by jury, in Solano Cournty.

III.

LACK OF SUBJECT MATTER JURISDICTION

Once the district court has determined tht it lacks subject matter jurisdiction it could only remand the case back to the State Court.

Judge Schwartz and Ramirez clearly stated that they did not have subject matter jurisdiction and Appellant did not and has not waived the subject matter of the litigation.

Judges Schwartrz and Ramirez claim of 28 U.S.C. Sec. 1651 can only be used if they have a jurisdiction in litigation, to which they denied they had. Without Sec. 1651 the substantiality doctrine is moot, as assumed juridiction foreign to the litigation is void.

> ....."But the lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, and the district court should, therefore, have declined sua sponte, to proceed in the cause."
>
> United States v. Corrick,
> 298 U.S. 435

COST AND DAMAGES

INJUNCTION

Appellant asked for the cost and reasonable damages as should be awarded to the appellant. With an injunction against the defendants to protect sppellant from the harassment by the public servants.

CONCLUSION

I. The XVI Amendment is a FRAUD.

II. Appellant has a right to a jury trial.

III. The District Court lack juris - diction to proceed.

It is clear that the appellees are attempting thru the district court to change the subject matter of the jurisdiction in order to excape the true cause of lititgation, as original and continuously claimed by the appellent. The appellees are attempting to place a freeman in chains, thereby denying him, his God given, natural and inalienable rights, to cause irreparable damage against the appellent and the PEOPLE OP THE UNITED STATES in the attempt of the WILLFUL CONTINUTANCE OF FRAUD to deny to the appellant the rightful and full intent of Due Procxess of the Law of the Land.

By thier undisclosed resons the appellees, as it is apparent to appellent, that the appellees are,

> ....."knowingly and willfully, falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representation, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry....."
>
> Title 18, Sec. 1001

The only defense of appellees is based upon Title 26, U.S.C. and claim of jurisdiction of authority by the fraudelant XVI Amendment of the United States Constitution.

The appellent respectfully request this court not to aid the appellees in their FRADULANT CONSPIRACY against the appellant and THE PEOPLE OF THE UNITED STATES.

from the foregoing reasons appellant respectfully request this court for a rehearing to remand the cases of the appellant to the AT LAW Cout of appellant for a Trial by Juty, in Solano County, in the State of California.

DATED: NOVEMBER 11, 1985.

/S/_____

CHARLES C. COOK

Plaintiff/Appellant

Pro Se.

DECLARATION

I, CHARLES C. COOK, declare that I am the Appellant in the foregoing action, that I have read the contents thereof, that they are true to the best of my knowledge except those allegations based on information and belief, and as to those, I believe them to be true.

DATED: November 11, 1985, at Vacaville, California.

/s/_____

CHARLES C. COOK

Plaintiff/Appellant

Pro Se.

CERTIFICATE OF SERVICE

On November 12, 1985, I werved the attached document entitiled:

APPELLANT'S

PETITION FOR REHEARING

on the interested parties in the action, by mailing a copy to the following:

Yoshinori H. T. Himel
Assistnat U. S. Attorney
3305 Federal Building
650 Capitol Mall
Sacramento, Ca. 95814

Robert N. Kwan
Trial Attorney, Tax Div.
Department of Justice
Washington, D. C. 20530

Thomas H. Gordinier
600 Union Ave.
Fairfield, Ca. 94533

Justin M. Roach, Jr.
1939 Harrison Street
Oakland, Ca. 94612

Richard G. Blair
Ordway Buldg. 13th. Floor
One Kaiser Plaza
Oakland, Ca. 94612

Glen L. Archer, Jr.
Assistanty Attorney General
Tax Division
U. S. Department of Justice
Tax/App.
Washington, D. C. 20530

Executed this 12 day of November 1985, at

Vacaville, California.

/s/_____

Carmella M. Kosar

INDEX OF EXHIBITS

C. A. No 85-1649

C. A. No. 84-2165

EXHIBIT A---"NOTLICE OF HIGH CRIMES, MISDEMANORS AND ON-GOING OFFENSES AGAINST THE UNITED STATES"

Dated: 7 Aug. 1985
(4-pages)

EXHIBIT B---"AT LAW NO. 84492 - ACTION AT LAW FOR DAMAGES (BREACH OF CONTRACT)"

Filed May 2, 1983
(2-pages)

EXHIBIT C---Case No. 84492 "ESTOPPEL"

Filed May 5, 1983
(1-page)

EXHIBIT D---Case No. 84882-"ACTION AT LAW FOR DAMAGES BREACH OF CONTR-ACT- DTRESPASS AND LIBEL"

Filed June 23, 1983
(3-pages)

EXHIBIT E---Civil No. 83-877-MLS-"Notice OF LACK OF JURISDICTION-CAVEAT-DEMAND FOR REMAND-POINTS AND AUTHORITIES".

Filed October 27, 1983
(3-pages)

EXHIBIT F---Civil No CIV S-83-1606-RAR
"VERIFIED CRIMINAL COMPLAINT
AND SOVEREIGN CIVIL ACTION AT
LAW"....

Filed December 27, 1983
(4-pages)

NOTICE FO HIGH CRIMES, MISDEMANORS AND ON-GOING OFFENSES AGAINST THE UNITED STATES

FROM:

CHARLES C. COOK
5956 CHERRY GLEN RD.
VACAVILLE, CA. 95688
DATES: 7, Aug. 1985

TO: United States Court of Appeals for the
Ninth Circuit
c/o Office of the Chief Justice
and all Judges thereof:
P. O. Box 547
San Francisco, California
94101

RE: OPEN LETTER

You are hereby placed on NOTICE by this "Notice of High Crimes, Misdemeanors and On-Going Offneses against the United States."

This Notice is made pursuant to the "Open Letter" attached hereto andmade an intertgral part thereof as if stated in its entirety: which reports and documents a fraud of massive proprttions that have been peretrated against the people of this country since 1913.

BEST AVAILA

A fraud whose continuing and on-going implementation by anyone having cognizance of its existence constitutes criminal activity, crimes and offenses against the United States of America.

/s/ _____

Signature

Enclosure(s): Copy of Open Letter with Exhibits
Declaration of Service by Mail

cc: Legal Records CERTIFIED MAIL P-612 976 010
with Domestic Return Receipt

EXHIBIT A PAGE 1

BLE COPY

BY REFERANCE ONLY; COPIES ON FILE WITH LOWER COURT.

EXHIBIT A PAGE 2:

DECLARATION OF SERVICE BY MAIL

" TO: United States Court of Appeals for the Ninth Circuit c/o Office of the Chief Justice and all Judges tnereof: ....."

EXHIBIT A PAGE 3:

List of parties:

Sen. Berry Keene,

Sen. Pete Wilson,

Sen. Alan Cranston,

Rep. Vic Fazio,

United States Court of Appeals for the Ninth Circuit,

United States District Court Eastern District of California.

ATTACHMENT: mail listed for August 7, 1985.

BEST AVAILABLE COPY

EXHIBIT A PAGE 4:

`Photo copies of:'

RECEIPT FOR CERTIFIED MAIL
P 612 978 101

DOMESTIC RETURN RECEIT

DECLARATION

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF SOLANO

"FILED"
May 2, 1983

CHARLES C. COOK, ... Plaintiff,	AT LAW NO. 84492
v.	
Peter Kiewit and Sons... Defendants.	ACTION AT LAW FOR DAMAGES (BREACH OF CONTRACT).

(EXHIBIT B PAGE 1, Line 19 to 22.)

"....This court has original jurisdiction under Amendment VII, of the United States Constitution, and under Article VI, Section 10 of the State Constitution for Constitutional torts at state common law."

(EXHIBIT B PAGE 2, Line 6 to 21.)

V.

"Plaintiff holds no legal rights or interests, no proprietorship, control or

(EXHIBIT B, P.2)

investments in any federal or state chartered dorporation (including defendant corporations herein.)

V.

Plaintiff receives no monies, wages or dollars from said defendants based on a percentage of the company profits, nor has ever done so. All such renumeration received (earned) by plaintiff was based on a QUID PRO QUO common law contract of work in pursuit of plaintiffs common right to earn a livehood as an independent tradesan.

VI.

Plaitiff does not now have, nor has ever had any GRANT; PERSONAL, PRIMARY OR SECONDARY FRANCHISE; SPECIAL OR GENERAL PRIVILEGE CREATED OR CONFERRED UPON PLAINTIFF BY STATE OR FEDERAL LAW. Nor does plaintiff possess any LEGAL RIGHTS OR INTERESTS CREATED OR CONFERRED UNDER OR BY

(EXHIBIT B, P.2)

BEST AVAIL

STATE OR LEDERAL LAW; nor does plaintiff hold any PRIVILEGES OR IMMUNITIES OF A PUBLIC NATURE."

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SOLANO
COMMON LAW PROCEEDING.

"FILED"
May 5, 1983

CHARLES C. COOK, ... Plaintiff,	CASE NO 84492
vs.	IN AT LAW PROCEEDING
Petrer Kiewit and Sons... Defendants.	ORDER TO PROCEED BY COMMON LAW.

"The plaintiff hereby informs the Court and the Defendants that estoppel is now attached baring defendants from invoking equity jurisdiction on their behalf. Defendants hav committed civil and criminal fraud against plaintiff (see exhibits A-E in plaintiffs declaration) (EXHIBIT C PAGE 1)

ABLE COPY

and this civil action is proceeding a criminal action. Because defendants have committed fraud they are barred by the `clean hands doctrine' from invoking equity jurisdiction. See Morgan v. Beleit 7 Wall 613, 19 L Ed 203.

Further, plaintiff has a plain speedy and adequate remedy at law as shown in declaration, therefore equity had no jurisdiction to intervene.

Plaintiff now orders the Clerk of the Court that the at law proceeding is to be maintained by rules of Common Law. Plaintiff action is brough to the Superior Court of Solano county by convenience and not necessity. Order is given that pursuant to the 7th Amendment U. S. Constitution, the state is barred from intercession by statute and equity means in behalf of defendants. CASE NO. 84492 is for Civil

BEST AVAI

remedies only.

/s/_____

Charles C. Cook,
Plaintiff

_____

"EXHIBIT D"

DECLARATION
IN THE SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF SOLANO

"FILED"
JUN. 23, 1983

CHARLES C. COOK, ... Plaintiff(s),	CIVIL NO. 84882
vs.	ACTION AT LAW FOR DAMAGES
Peter Kiewit and Sons;....	BREACH OF CONTRACT TRESPASS AND LIBEL

(EXHIBIT D PAGE 1 LINE 13 TO 17)

"THIS ACTION IS, IN REALITY, AN AMENDED DECLARATION OF PLAINTIFF ORIGINAL ACTION: CIVIL NO. 84492, BUT IS MASQUERADING AS A NEW ACTION UNDER THE ABOVE NUMBER DUE TO THE COERCION AND

(EXHIBIT D PAGE 1, LINE 13 TO 17)

ABLE COPY

LAWBREAKING OF THE SOLANO COUNTY SUPERIOR COURT CLERKS' OFFICE. COMES NOW THE PLAINTIFF AND AMENDS HIS ORIGINAL DECLARATION (NO. 84492) AND DOES PRESENT THE FOLLOWING EVIDENCE ANDTESTIMONY TO THE JURY:"

(EXHIBIT D PAGE 2, LINE 15 TO
PAGE 3, LINE 23)

....."And under Clause three:

> "...all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution..."

Which Constitution includes Amendment VII and IX:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the RIGHT OF TRIAL BY JURY shall be preserved, and no fact tried by a jury, shall otherwise be be re-examined in any court of the United States, than ACCORDING TO THE RULES OF THE COMMON LAW."

AMENDMENT VII.

(EXHIBIT D PAGE 2)

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained BY THE PEOPLE."

AMENDMENT IX.

Defendant Ely, having sworn an oath to uphold the "Law of the Land", knos full well (or shold know) that the words Law of the Land, Due process of Law, and Due course of law are all synonymous. See People vs. Skinner, 110 P. 2d 41; Stoner vs. Higginson, 316 PA 481. And that the Law of the Land MEANS the Common Law; Justice O'Neal in State vs. Simmon, 2 Spears 761 and Justice Bronson in Taylor vs. Porter, 4 Hill 140 AT LAW Action. (see exhibit "G" appended hereto.) Such lawbreaking by plaintiff's public servant is intolerable and plaintiff adds defendant Ely to this action .....

.....While defendant Ely may try to justify his ellegal and caprecious act of

"dismissing" AT LAW aaction by claiming that the facts of this case are not in dispute (due to defendant' demurrer) and therefore HE can determine or decide the law in this cause-this is manifestly NOT the case. Mr. Ely had NO jurisdiction to exercise his privilege in this action and make a determination as to the Law governing this case. It is NOT his prerogative. It is the sle providence of the jury in an AT LAW action, and defendant Ely's usurpation of the jury's power is an unlawful fiolation of the Seventh Amendment to the U.S. Constitution.

Further, defendant Ely is sadly mistaken as to the Law governing this case. It is not governed by Stonecipher v. Bray nor is there any limitation on the AT LAW Court as to jurisdiction of the subject matter./see appendm Nor has

plaintiff brought his action before the equity side of the superior court-for under the California Code of Civil procedure, section 190, it defines "Jury" as:

> "A jury is a body of persons temporarily selected from the citizens of the area served by the court and invested with power to present or indict a person for a public offnese, or to TRY A QUESTION OF FACT."

(EXHIBIT D PAGE 3)

.....

*

Demandant in Propria persona

"FILED"
OCT. 27, 1983

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CHARLES C. COOK, and all others so similary situated, DOES 1 through 30,	Civil No. 83-877-MLS
DEMANDANT	SUPERIOR COURT NO.84492
Vs.	SUPERIOR COURT NO.84882
PETER KEEWIT SONS' CO., et al.,	NOTICE OF LACK OF JURISDICTION
DEFENDANT	CAVEAT
and	DEMAND FOR REMAND
UNITED STATES DISTRICT COURT, and all MAGISTRATES, CHANCELLORS, CLERKS AND EMPLOYEES thereof,	POINTS AND AUTHORITIES
RESPONDENTS	

1

BY CLAIM OF SPECIAL APPEARANCE

.....

(EXHIBIT E PAGE 1)

Federal Chancellor, thereby summarily disposing of the Civil and Criminal Charges against the Defendants therein;..

.....

However, such Action, and assumption of Jurisdiction by the federal c ourt is unwarranted, UNLAWFUL, and would seriously impair Demandant's Clear RIGHT to JURY TRIAL as guaranteed in the 7th Amendment to the United States Constitution:

> "In suits at Common Law, where the value in Controversy shall exceed twenty dollars, the Right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the RULES of the COMMON LAW."

Demandant's peers reside in Solano County ---NOT in Sacramento!

CAVEAT

Any attempt by Chancellors or Clerks of the federal court to seperate Demandant

from his Lawful/Constitutional RIGHTS will result in Criminal and Civil charges to be persued against the offending party(s). The federal court has been given a pseudo-jurisdiction, or more correctly--the mere form or appearance of lawful jurisdiction, but NOT the true SUBSTANCE thereof. This "form" was gained through the inmproper removal proceedings of a desperate United State Attorney's office in an attempt to further their own ends. Therefore this Court should, Sua Sponte, REMAND this action back to the Superior Court from which it originates.

DEMAND FOR REMAND

Demandant hereby demands that the above-entitled Common Law Action--filed AT LAW--be remanded back to its depositry with the Clerk of the Solano Superior Court. The Federal Court has been divested of any and

(EXHIBIT E PAGE 2)

all jurisdiction over this Action by its very Nature and origin of filing.

POINTS AND AUTHORITIES

Demandant DEMANDS that this court's agents take NOTICE of the FOLLOWING:

1) If at any time before final judgement it appears that the case was removed improvidently and without jurisdiction the district court shall remand the case, and may ordr the payment of just cost.

28 USC 1447(c)

2) Removal statutes must be strictly construed and every doubt should be resolved in favor of remand.

Fountain park Coop. Inc. v. Bank of America, Nat. T & S Assn. (1968) 289 F. Supp. 150, 153.

Gluckmans vs. Columbia Broadcasting Systems, (1963) 219 F. Supp. 767,768

3) An action must first be properly pending in the court from which removal is sought as a condition pre-requisite to removl.

Ristuccia v. Adams, 406 F 2d 1257

(EXHIBIT E PAGE 3)

4) Where Federal and State courts have concurrent jurisdiction in a civil or criminal case the tribunal which first obtains jurisdiction holds it, to the exclusion of the other, until its duty is performed; the acquistion of jurisdiction by the one divests the other of all jurisdiction.

Smith v. McIver, 9 Wheat 535

Covell v. Heyman, 111 U.S. 182

Baggs. v. Martin, 179 U.S. 209

5) "ever since the cse of Ableman v. Booth, 21 How. 506, it has been the settled doctrine of this court that a court having possesion of a person or property cannot be deprived of the right to deal with such person or property until its jurisdictin is exhausted, and that no other court has the right to interfere with custody or possession."

On Re Johnson, 167 U.S. 125

DATE: OCTOBER 26, 1983

/S/_____

Charles C. Cook,
DEMANDANT in
Propria Persona.

(EXHIBIT E PAGE 3)

UNITED STATES DISTRICT COURT CLERKS OFFICE

"FILED"
DEC. 27, 1983

Charles C. Cook,.... DEMANDNANTS,	) CIV S-83-1606-RAR
vs.	) VERIFIED'CRIMIAL COMPLAINT AND
PETER KIEWIT SONS';... DEFENDANTSL	) SOVEREIGN CIVIL ACTION AT LAW

AFFIDAVIT AND
DECLARATION OF CONSPIRACY
TO COMMIT MURDER/EXTORTION
BLACKMAIL/TREASONR

CONSPIRACY TO VIOLATE
CIVIL RIGHTS

(EXHIBIT F PAGE 1, LINE 22 TO
PAGE 3, LINE 16)

....."This Instrument shall constitute a Formal Criminal Complaint against the Law Breakers/Defendants named herein, as well as a sovereign Civil Action AT LAW, in that it is based upon LAW (and NOT upon Judges opinions or legislative fiat and like equitable procedure and processes). Therefore, service of this Instrument upon any law Enforcement officer (Sheriff, Dis-

(EXHIBIT F PAGE 2)

trict Attorney, Attorney General, city police or the Grand Jury) by Plaintiff or plaintiff's agents, is to be deemed a formal Criminal Charge/Complaint and a directive to said Law Inforcement officials to investigate and prosecute the Defendants named herein to the FULL EXTENT OF THE LAW. .....

.....This Action is filed with the Clerk of the Federal Cort in an effort to Maintain and preserve a PUBLIC RECORD of this AT LAW proceedint. it is in NO WAY to be construed as placing plaintiff's Casuse of lAction and/or Remedyu within the Jurisdiction of the Corporate entity known as the Federal government, or into the discretion of said corporation's agents; ..... The Clerk of the Federal Court is to be an official depository for the pleadings and documentary evidence in this action out of necessity as plaintiff

has been barred from creating, maintaining or pursuing such lawful remedies in his County Court ..... This said action AT LAW is NOT to be construed as a "civil Action" within the meaning and intent of the Federal rules of civil procedures. (Title 28 USC) But is a Sovereign action with the Clerk of the Federal Court acting as an official De Facto County Clerk and Depository for the maintenance of a PUBLIC record of this sovereign civil and criminal proceedings.

III.

SCOPE OF PROCEEDINGS

Plaintiff hereby incorporates all Pleadings, Documents, Notices, Files, Records, Exhibits, Letters and like information on file in Solano County, under Civil Case Numbers 84492 and 84882, as if setforth fully herein and made a

(EXHIBIT F PAGE 3)

full part hereof by reference thereto. Also including the SHAM proceedings and Documents filed with the Federal Court Clerk, under Civil Number CIV S-83-877-MLS."

(EXHIBIT F PAGE 4, LINE 3 TO LINE 16)

....."under color of law and without a jury tral or any pretext of due process, as guaranteed by the following:

Magna Carta, June 15, 1215 A.D.
(see articles 24 and 39)

Declaration of Rights, Oct. 19, 1765

Declaration of Rights, Oct. 14, 1774

Northwest Territorial Ordianance of July 13, 1787 (article II)

Constitution of the United States, September 17, 1787

(EXHIBIT F PAGE 4)

Constitution of the State of California, as amended and in force November 4, 1982.[1]

The chancellory decrees (carefully designed by the legal profession) to separate plaintiff from his property without due process of a jury trial must and will be resisted by plaintiff, using the law of the Land, by whatever means necessary, as is plaintiffs inalienable right (see Billings v. Hall) ....."

---

1. These present day "Legal proceedures", denying the principles found in the above listed documents. have been developing for over 75 years. At their present state of development they are a complete TRAVASTY of Justice. If plaintiff and others like him do not take a stand now, today, and resist these summary procedures, what will it be like for our children ? What will be the extent of the tyranny they will face ?

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES C. COOK, and others similarly situtated, DOES I-XXX Plaintiff-Appellant, v. PETER KIEWIT & SONS CO., SOUTHERN ELECTRICAL CONTRACTORS, INCL., KIEWIT-SOUTHERN (A JOINT VENTURE), RODNEY D. BECK, BRUCE MORSE) MIKE ROONEY, RICH NABOR, DAVID COHEE, DON KELSEY, CLINT GWYNN,III, JUSTIN M. ROACH, LARRY MEWWISSEN, DWIGHT C. ELY, MICHAEL MCINNIS, Defendants-Appellees	C.A. NO 85-1649 D.C. #CIV S-83-877-MLS "FILED" Nov. 26,1985
CHARLES C. COOK and others similarly situatted, DOES 1-XXX, Plaintiff-Appellant, v. PETER KIEWIT SONS,SOUTHERN ELECTRICAL CONTRATORS, KIEWIT-SOUTHERN (A JOINT VENTURE), RODNEY C. BECK, BRUCE MORES, MIKE ROONEY, RICH NABOR, DAVID COHEE, DON KELSEY, CLINT GWYNN,III) JUSTIN M. ROACH, LARRY	C.A. NO. 84-2165 D.C. #CIV S-83-1609-RAR O R D E R - - - - -

(EXHIBIT C PAGE 1)

MEUWISSEN, DWIGHT C. ELY,)
MICHAEL MCINNIS, THOMAS H.)
GORDINIER, KATHLEEN T. GUNN)
DONALD B. LAYER, YOSHINORI)
H. T. HIMEL, GREG CIAPPOINI)
NEIL CRAWFORD, CAROL)
TAMBVARELLI, MILTON L.)
SHCWARTZ, AND DOES 26)
through 50,)
Defendants-Appellees.)
)

Appeal from the United States District Court for the Eastern District of California

Before: NORRIS and REINHARDT, Circuit Judges, and JAMESON,* District Judge.

The panel as constituted in the above case has noted to deny the petition for rehearing.

The petition for rehearing is denied.

---

* The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

(EXHIBIT C PAGE 1)

Please note that the follwiong is taken from an exact photocopy of the orgional unaltered document which is on deposit at the Disision of Archives and Records Management, Commonwealth of Kentucky.

SOURCE: Journal of the Senate Vol. 102

ARCHIVIST: Larry Barnett

DATE: July 18, 1985

NOTARIES: BY Goodloe C. Denton
"COMMISSION EXPIRES may 31, 1989"

H. B. 113. An Act t amend Section 3490, Sub-Section 22, of the Kentucky Statutes, relating to Charters of cities of the fourth class.

Which bills were severally read the first time and under the Constitutioanl proision and Rules of the Senat were ordered printed and placed upon the Clendar for furhter reading on a subsequent day.

A message was received from the House of Representatives, announcing that they had adopted a Resolution, entitled, viz:

H. Res. 4. Resolution ratifying the 16th Amendment to the Constitution of the United States.

On motion of Mr. Eaton the Rules were suspended and the Senate took up for consideration said Resolution.

Said resolutin reads as follows, viz:

Resolution ratifing the 16th, amendment to the constitution of the United States.

WHEREAS, the Congress of the United States on July _ _, 1909, adopted a jointd resolution, proposing and amendment to the constitution of the United States, as follows:

Resolved, by the Senate and House of Representatives of the U.S.A., in Congress assembled, two-thirds of each Housse concurign therein, that, the following article is proposed as an amendment ot the Constitution of the United States, which, when ratified by the legisatures of three-forths of the several States, shall be valid to all intnents and purposes, as a part of the Constitution:

Article XVI. The Congress shall have power lay and collect taxes on incomes from whatever sources derived, wighout aportionment among the several States, and without regard to any census or enumeration." And the foregoing proposed amendment having been laid before the Legislature of the State of Kentucky for consideration and action:

Now Therefore, be it resolved by the

General Assembly of the Commonwealth of Kentucky: That the foregoing amendment ot the constitution of the United States be, and the same is hereby ratified to all intents and purposes, as a part of the constitution of the United States.

2. That the Governor of this State is hereby requested to forward to the President of the United States an aurhentic copy of the foregoing joint resolution.

And the question being taken upon the concurring in the adoption of said Resolution, it was decided in the affirmative.

The yeas andnays being required thereon were as follows, viz:

Those who voted in the affirmative were--

Beard, P. J., Hogg, E. E.,

Bertram, E,.	Hubble, R. L.
Brown, Gus,	Mathers, Dr. C. W.
Brown, R. B.	Vice, John L., --9

Those who voted in the negative were----

Arnett, B. M.,	Oliver, A. J.,
Arnett, L. W.,	Ryan, Mar,
Catlett, J. R.,	Salmon, R. M.,
Chipman, N. B.	Smith, Haillard,
Combs, Thos. A.,	Smith, J. T.,
Cureton, Nat. C.,	Taylor, E. M.,
Dowlling, W. E.,	Taylor, G. A.,
Grigsby, B. C.,	Thomas, Claude M.,
Linn, Conn,. W.,	Tichenor, Dr. B. F.
Nagle, Chas. W.,	Watkins, J. J.,
Mewcomb, H. D.,	Wyatt, G. T., -----22

End of documents

PLEASE NOTE THE ABOVE COUNT:

AFFIRMATIVE -----9

NEGATIVE --------22

TABLE OF CONTNETS

The following documents are from the National Archives of the United States, concerning the ratification of the XVI Amendment by the States and certified:

" NATIONAL ARCHIVIE AND RECORDS
ADMINESTATION

To all to whom these presnets shall come.

Greeting:

By virtue of the authority vested in me by the Archivist of the United States, I certify on his behalf, under the seal of the National Archives of the United Stated, that the attached repoductins(s) is a true and correct copy of documents in his custody.

Signature: Milton O. Gustafson

Title: Chief, Depolmatic Branch

Address: The National Archives
Washington, D. C. 20408

Dated: 8-5-85."

"AA" Memorandum for the Chief Clerk, Feb. 10, 1913. "....Amendment has been incorretly quoted."

"BB" Memorandum - Office of the Solicitor, Feb. 15, 1913. NOTE PAGE: "Errors in Resolutions of State legislatures in quoting the proposed XVI Amendment."

Petitioner has certified copies of the States of: Arizona, California , Colorado, Idaho, Kentucky, Minnesota, Montana, Nevada, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Washington, Wyoming.

Petitioner has not list all states, Arizona, North Dakota, New Mexico are the only ones of this list to have properly ratification of the XVI Amendment. All others are in error.

DEPARTMENT OF STATE
WASINGTON

MEMORANDUM FOR THE CHIEF CLERK.

February 10, 1913

My dear Mr. McNeir:

I am advising you that thirty-six States have officially notified the Depatement of their ratification of the proposed Income Tax Amendment to the Constitution of the United States in order tht the Secretary may be advised of the fact for the prupose of taking such action as he may desire in pursuance with Section 205 of the Revised Statutes.

Attached hereto yo u will fınd a list of the thirty-six States as well as copies of teh Joint resolution of Congress proposing the Amendment, and the Department's letter of July 25, 1909, submitting the Amendment to the States for

3E.

their action thereon.

While the original papers relating to the Constitution of the United States are filed in the Bureau of Rolls and Library, it is presumed that a report of the legality of the Ratificatioons in question is matter which the Secretary woud probably refer to the solicitor of the Department.

I wish to say, however, that with one or two exceptios the States have furnished a cetified copy of their Resolution ratifing the Amendment, but in many cases the Resolutio9n of Congress peoposing the Amendment has been incorrectly quoted.

In addition to the thirty - six States, the States of Wyoming and New Mexico have notified the Department by telegraph of their Ratification, and it is probable that certificates of their action

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will be received in a few days

"signature" U.L.

Chief of Bureau.

"AA"

"BB"

DEPARTMENT OF STATE

OFFICE OF THE SOLICITOR

MEMORANDUM

February 15, 1913.

Ratification of the 16th Amendment to the Constitution of the United States.

The Secretary has referred to the Solicitor's Office for determination the question whether the notices of ratifications by the several sttes of the proposed 16th amendment to the Constitution.....

.....The following is a list of the states indicating the errors made:

Alabama	Error of punctation.
Kentucky	Errors of punctuation and capitaliation.
Sorth Carolina	Error of capitlatization.
Illinois	Error of capitlatization: "renumeration" instead of "enumeration"
Mississippi	"The" omitted before "Congress"; errors of punctuation and capitalization: "of" instead of "or" before "enumeration".
Oklanoma	Error of capitlaizatin: "from" used instead of "without regard to" before "any".
Maryland	Error of puncutation.
Georgia	"Levy" used instead of "lay"; errors of punctuation;"sources" instead of "source"; "income" instead of "incomes".
Texas	Error of punctuation.
Ohio	Error of capitalization.

Idaho	Error of capitalization "of" instead of "or" before "enumeration".
Oregon	Error of capitalization.
Washington	Errors of capitalization and punctuation; "income" instead of "incomes".
California	"The" omitted before "Congress"; "any" before "census", and "or" before "enumeration" omitted; errors of puncuation and capitalization.
Montana	Errors of capitalization
Indiana	Error of capitalization.
Nevada	Errors of punctuation and capitalization.
North Carolina	Errors of punctuation and capitalization.
Nebraska	Error of Capitalization.
Kansas	Error of capitalization.
Colarado	Error of punctuation.
North Dakata	No Errors.
Michigan	Error of capitalization.
Iowa	Error of capitalization.

Missouri	Error of capitalization; "levy" instead of "lay".
Maine	Errors of punctuation and capitalization.
Tennessee	No errors.
Arkansas	"The" before "Congress' omitted; "the before "power" inserted: errors of punciuation and capitalization.
Wisconsin	Erors of capitalization.
New York	Errors of punctuation and capitalization.
South Dakota	"The" before "Congress" omitted; errors of punctuationa and capitalization.
Arizona	No errors.
Minnesota	Resolution of the State Legislature not filed with the Department.
Louisiana	Error of Punctuation.
Delaware	"Article XVI" omitted; errors of punctuation.
Wyoming	Errors of punctuation and capitalization.
New Jersey	Error of capitalization
New Mexico	No errors.

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INTENT OF RATIFICATION DID NOT MEET STANDARDS FOR RATIFICATION UNDER ARTICLE V. OF THE UNITED STATES CONSTITUTION

The issue being raised herein involves the ratification of an amendment to the United States Constitution. Precisely, the Petitioner contends that the Sixteenth Amendment to the United States Constitution was never ratified by the requisite number of state legislatures as required by Article V. of the constitution and that Secretary of State Philander Knox committed an unlawful and fraudulent act when he certified that the amendment had been adopted. The argument against this issue, and the response which the Petitioner anticipates herein by the Respondents, is that this issue is nonjusticiable and presents only a political issue which cannot be resolved in the Court.

A somewhat weaker argument against this proposition is a "lateness of the hour" theory, which holds that the lapse of time prevents an inquiry of this issue. The Petitioner, however, maintains that the issue is one which presents a judicial question not barred by lapse of time, and that the evidence that has been presented herein will conclusively show that the challenged amendment was not adopted.

In reference to the contention that the issue of the ratification of any amendment to the constitution presents only a political question, analysis of the determination of this issue by various state courts is very probative. The great weight, if not the entire weight, of state authority is that issues concerning the the ratification of amendments to state constitutions are properly judicial and not political issues. This proposition

of law is precisely summarized by In re McConaughy, 106 Minn. 392, 199 N.W. 408 (1909), which held, after lengthy review of the authorities on this point, that an issue regarding the ratification or adoption of a constitutional amendment was clearly to be judicially resolved. Indeed, the U. S. Supreme Court held that questions regarding the existence or non-existence of state laws presents a judicial question. In Town of South Ottawa v. Perkins, 94 U.S. 260 (1877), the Court succinctly stated as follows:

> "there can be no estoppel in the the way of ascertaining the existence of a law. That which purports to be a law of a State is a law or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties....And whether it be a law or not a law is a judicial question, to be settled and determined by the courts and judges".
>
> 94 U.S., at 267.

> "....but, on generl principles, the question as to the existence of a law is a judicial one, and must be so regarded by the Courts of the United States."
>
> 94 U.S., at 268

And when an issue regarding the existence of a law is raised, the Supreme Court has expressly sanctioned courts to determine the validity of such law by review of any public documents available which render aid to the judicial mind. This was clearly stated in Gardner v. Collector, 73 U.S. (6Wall.) 499 (1868), where the Court stated:

> "We are of the opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such questions; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."
>
> 73 U.S., at 511.

An inexhaustive review of the multitude of state cases holding that the issue regarding the adoption of constitutional amendments presents a judicial question is particularly appropriate under these circumstances. The substance of these cases is that state courts will hold an amendment invalid if it has not been properly and lawfully adoptd, this invalidity being determined by examination of many public records, most notably legislative journals. It must also be noted that while state courts do inquire into the adoption of amendments, they sometimes have a different rule in regard to legislation, with some courts follwing the "journal entry rule," and others following the "enrolled bill rule", see Field v. Clark, 143 U.S. 649, 12 S. Ct. 495 (1892). In the official U.S. Reports for Field v. Clark, supra, a footnote contains cites to

many such cases, but this footnote is omitted in West's Supreme Court Reporter.

Probably the first state court to be confronted with the issue concerning adoption of amendments was the Alabama Supreme Court. In Collier v. Frierson, 24 Ala. 100 (1854), this Court invalidated an amendment to the state constitution for the reason that it had not been properly adopted. Here, the Court held as follows:

> "It has been said, that certain acts are to be done - certain requisitions are to be observed, before a change can be effected. But to what purpose are these acts required, or these requisitions enjoined, if the Legislature or any other department of the government, can dispense with them. To do so would be to violate the instrument which they are sworn to support; and every principle of public law and sound constitutional policy requires the courts to pronounce against every amendment, which is shown not to have been made in accordance with the rules prescribed by the fundamental law", 24 Ala., at 109.

The rule enunciated in Collier, supra, has been frequently cited in many other cases in other jurisdictions, and is still

followed in Alabama. In a recent case, Alabama v. Manley, 441 So. 2d 864 (Ala., 1983), the Alabama Supreme Court invalidated a legislative attempt to introduce an entirely new state constitution through the subterfuge of the amendment process. The bold attempt at legislative usurpation of constitutional restraints is clearly demonstrated and the reason for this rule is made obvious in Manley, supra.

The Supreme Court of Arkansas likewise holds that it is a judicial function to determine the adoption of a constitutional amendment. In Rice v. Palmer, 78 Ark. 432, 96 S.W. 396 (1906), the Court was con fronted with the issue as to whether an amendment had received enough votes to be ratified, notwithstanding a plurality of votes in favor of the amendment. Here, the Court struck the amendment and held that the issue presented was clearly judi-

cial; see also Knight v. Shelton, 134 F. 423 (E.D. Ark.., 1905).

The cases from the California Supreme Court which hold that this issue is a judicial one are frequently cited. In Oakland Paving Co. v. Hilton, 69 Cal. 479, 11 P. 3 (1886), this Court invalidated a state constitutional amendment which had been approved by the voters. The Court considered the issue to be a judicial one and found that the state legislature had violated certain constitutional provisions when it had proposed the amendment. In Livermore v. Waite., 102 Cal. 113, 36 P. 424 (1894), the court likewise struck, on the basis of improper proposal by the legislature, an amendment to change the site of the seat of government, the State Capitol. In People v. Curry, 130 Cal. 82, 62 P. 516 (1900), the Court struck an amendment proposed by the

legislature during an extraordinary session which had been convened by the governor, the reason being that the legislature could not propose amendments during such sessions.

The Florida Supreme Court likewise follows the above rule. In Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963 (1912), Gilchrist, the State governor, sued Crawford the Secretary of State, to enjoin the publication of a proposed constitutional amendment. The court granted the relief sought by the governor and held that the issue was judicial. In doing so, the Court delineated a precise situation in reference to such amendments in which an equitable remedy would lie:

> "The act of the Secretary of State in publishing at public expense and in certifying to the county commissioners proposed amendments of the Constitution is in its nature ministerial, involving the exercise of no discretion, and, if the act is illegal, it may be enjoined in appropriate proceedings by proper

parties; there being no other adequate remedy afforded by law. When the alleged illegal act sought to be enjoined has relation to legislative action, such action may be considered in determining the legality or illegality of the act enjoined. This is not an interference by the courts with the legislative department of the government", 59 So., at 967.

This rule is likewise followed by the Supreme Courts of Georgia and Idaho. In Hammond v. Clark, 136 Ga. 313, 71 S.E. 479 (1911), this Court held that the issue was a judicial one and the governor's proclamation of the adoption of an amendment was not conclusive on the courts. In Green v. State Board of Canvassers, 5 Idaho 130, 47 P. 259 (1896), the Court inquired into the number of votes cast in an election in favor of an amendment. While the court upheld the challenged amendment in Green, supra, it struck an amendment in McBee v. Brady, 51 Idaho 761, 100 P. 97 (1909); in both of these Idaho cases, the issue was definitely considered to be a judicial

one.

In Illinois, it is obvious that the Illinois Supreme court follows this same rule. In City of Chicago v. Reeves, 220 Ill. 274, 77 N.E. 237 (1906), and People v. Stevenson, 281 Ill. 17, 117 N.E. 747 (1917), the Court addressed issues which challenged amendments, although the Court upheld the amendments. In Indiana, the Indiana Supreme Court has, on many occasions followed this rule and invalidated amendments. In State v. Swift, 69 Ind. 505 (1880), the Governor and Secretary of State proclaimed an amendment as having been adopted, but the court struck the same and held the amendment void. In In re Denny, 156 Ind. 104, 59 N.E. 359 (1901), the court invalidated an amendment which did not receive a constitutional majority of the votes cast at election. In Ellingham v. Dye, 178 Ind. 336, 99 N.E. (1912),

the Court plainly stated that questions regarding adoption of amendments were judicial and voided the legislature's attempt to propose a new state constitution; see also Bennett v. Jackson, 186 Ind. 533, 116 N.E. 921 (1917).

Cases on this issue from the Iowa Supreme Court are very probative. In Koehler v. Hill, 60 Iowa 543, 14 N.W. 738, reh. den., 15 N.W. 609 (1883), the Court was faced with a situation where it was clear that an amendment proposed by one legislature was different from the amendment subsequently submitted to the people for vote by the succeeding legislature. The amending clause of the Iowa constitution required an amendment to be proposed by two different sessions of the legislature. In review of the legislative journals, it was obvious that there were minor changes in the different versions of

the amendment proposed by the two different legislative sessions. This caused the court to hold the amendment invalid:

> "Not only so, but each house of each general assembly must agree to the same amendment, and it must be adopted by the electors. It matters not if not only every elector, but every adult person in the state, should desire and vote for an amendment to the constitution, it cannot be recognized as valid unless such vote was had in pursuance of, and in substantial accord with, the requirements of the constitution. If, then, both houses of the eighteenth general assembly did not agee to the resolution which was adopted and ratified by the electors at the special election held for that purpose, it is not a part of the constitution, and cannot be so recognized", 14 N.W. at 741, 742.

On rehearing, the Court held that recitals contained in legislative resolutions will be held untrue if they are plainly untrue; 15 N.W., at 622. The amendment was invalidated in this case notwithstanding a popular vote in favor of the same. In State v. Brookhart, 113 Iowa 250, 84 N.W. 1064 (1901), the Court struck another amendment which had not been properly adopted.

The courts in Kansas and Kentucky are in accord with the same rule. In state v. Sessions, 87 Kan. 497, 124 P. 403 (1912), the Attorney General prevented an amendment from being proposed for voting by the electors because he believed that the legislative journals showed that the same amendment had not been adopted by both houses of the legislature. Some years later, the Attorney General instututed suit to determine if the proposed amendment could, in fact, be submitted to the people for a vote. The Court held it could not because the procedure for adopting an amendment has not been followed. In McCreary v. Speer, 156 Ky. 783, 162 S.W. 99 (1914), the Kentucky Supreme Court voided an amendment which had not been published within the time period required by the constitution.

In Graham v. Jones, 198 La. 507, 3 So.

2d 761 (1941), the Louisiana Supreme Court wrote a very lengthy opinion which voided an amendment because it had not been properly adopted. In response to allegations that such action would be extremely disruptive to the state government, the Court stated:

> "It is said that chaos and confusion in the governmental affairs of the State will result from the Court's action in declaring the proposed constitutional amendment void. This statement is grossly and manifestly inaccurate. If confusion and chaos should ensue, it will not be due to the action of the Court but will be the result of the failure of the drafters of the joint resolution to observe, follow and obey the plain essential provisions of the constitution. Furthermore, to say that, unless the Court disregards its sworn duty to enforce the constitution, chaos and confusion will result, is an inherently weak argument in favor of the alleged constitutionality of the proposed amendment. It is obvious that, if the Court were to countenance the violations of the sacramental provisions of the constitution, those who would thereafter desire to violate it and disregard its clear mandatory provisions would resort to the scheme of involving and confusing the affairs of the State and them simply tell the court that it was powerless to exer-

cise one of its primary functions by rendering the proper decree to make the constitution effective", 3 So. 2d, at 793, 794.

In Massachusetts, the State Supreme Court, in Loring V. Young, 239 Mass. 349, 132 N.E. 65 (1921), determined that a proposed new rearranged state constitution was not effective and that the old constitution which was sought to be replaced was still in effect. In Michigan, that Supreme Court, in Rich v. Board of State Canvassers, 100 Mich. 453, 59 N.W. 181 (1894), held that the issue was also a judicial one.

Both Mississippi and Missouri follow this proposition of law. In a frequently cited case rendered by the Mississippi Supreme Court, the Court, in State v. Powell, 77 Miss. 543,. 27 So. 927 (1900), struck an amendment and stated the issue was judicial. The same holding was made by the Missouri Supreme Court in Gabbert v.

Chicago, R.I. and P. Ry. Co., 171 Mo. 84, 70 S.W. 891 (1902), although this court upheld the challenged amendment. The Montana Supreme Court vitiated two amendments for this reason in the two cases of State v. Tooker., 15 Mon. 8, 37 P. 840 (1894), and Durfee v. Harper, 22 Mon. 354 , 56 P. 582 (1899). An amendment was also struck in State v. Babcock, 17 Neb. 188, 22 N.W. 372 (1885), as were other amendments in State v. Tufly, 19 Nev. 391, 12 P. 835 (1887) and State v. Davis, 20 Nev. 220, 19 P. 894. (1888).

The issue is considered judicial in New Jersey see Bott v. Wurts, 63 N.J.L. 289, 43 A. 744 (1899). The same has been held in State v. Foraker, 46 Ohio St. 677, 23 N.E. 491 (1890), State v. State Board of Equalization, 107 Okl. 118, 230 P. 743 (1924), and Kadderly v. Portland, 44 Ore. 118, 74 P. 710 (1903), for the states of

Ohio, Oklahoma, and Oregon. Similar holdings for South Dakota, Washington and Wisconsin can be found in Lovett v. Ferguson, 10 S.D. 44, 71 N.W. 765 (1897), Cudihee v. Phelps, 76 Wash. 314, 136 P. 367 (1913), Gottstein v. Lister, 88 Wash. 462. Amendment, and t6his same amendment must be adopted by the people. No stae court would sanction an amendment in a situation where both houses did not agree upon the same amendment, or where the people voted upo0n an amendment different from lthat proposed by the legislature. A failure in this respect vitiates the entire amendment because there is not complete but imscomplete agreement on the amendment. This was aptly demonstrated in Koehler v. Hill, supra, where an amendment was determined not to have been adopted in accordance with the requirements of the Iowa Consstituion because it was shown

that there were minor word omissions between the amendment proposed by one legislative session and that proposed by a subsequent legislative session, which received the majority of the votes at election.

Constitutions are general frameworks of government and are considered paramount and supreme law. Because they should not be changed for light or transient causes, propositions to change a constitution by amendment are major undertakings. Not only is it hard to amend a constitution, it is also hard to repeal an amendment once it has become a feature of the constitution. This is in contrast with ordinary legislation, which is, comparatively, easier to enact, change or repeal. Statutes can be passed on one day and amended or repealed the next. Thus, it is quite apparent that constitutitonal

amendments are far more important, when considering their adoption, than enactment of ordinary legislation. Since they are relatively more important than ordinary legislation, an examination of the preciseness of concurrence in legislation required by the state court is invaluable in determining the preciseness of concurrence required to adopt an amendment.

The proposition of law demonstrated by the state cases in reference to the enactment of ordinary legislation is that both legislative bodies must adopt the same bill and the same bill must be presented to the governor for his approval or rejection. If there are material differences between the bill adopted by one legislative body and that adopted by the other, or if there are differences between that which is adopted by both

houses and the bill approved by the governor, the state courts will hold that there was no valid enactment of the statute. If this preciseness is required for ordinary legislation, then at least the same or a more stringent standard is required in the adoption of an amendment.

An excellent example of a case dealing with concurrence in a proposed bill is Moog v. Randoph, 77 Ala. 597 (1884). Here, the Alabama legislature had adopted a bill which contained a certain phrase inserted in the same by way of amendment. In the bill sent to the governor, this phrase had been deleted, probably through error. Nonetheless, the Alabama Supreme Court struck the entire act; in doing so, the Court Stated:

"I take it furthermore as a sound rule, also settled by our decisions, that if the bill which is passed by the General

Assembly varies materially, in substance and legal effect, from that which is approved by the Governor -especially where this subject of variance involves a matter of amendment, without the incorporation of which in the bill one of the houses refused to concur with the other in its final passage, then there exists such a want of legal and actual identity between the bill passed and the one approved, as that neither of them acquires the force of a valid and constitutional enactment. In such a case, the bill passed by the General Assembly is not the one approved by the Governor, and the one approved by the Governor is, e converso, not the one passed by the General Assembly. The courts would be assuming too much, to presume that the same reasons which induced the one house to refuse to concur with the other, except on the condition of

incorporating its amendment, might not likewise operate to induce the Governor to withhold his approval of the entire measure, without which it must have failed to become a law", 77 Ala., at 599.

"Let us suppose, for illustration, that the bill in its complete form, as it passed the two houses, had been signed by the presiding officers of these respective bodies, and had been presented to the Governor for his approval, and he had drawn his pen through this same amendment, and, after thus expunging it, had approved the residue of the measure, this being done as a condition precedent to affixing his signature. Would there not exist, in such a case, precisely the same difference in fact between the bill passed and that approved, as is here presented? The part expunged in the one case, and the part omitted in the other, being identical, the

identity of the remainder is axiomatic. Could any one seriously contend, that the approval of a part of a measure, however honestly done in the conviction of its propriety, would operate to give any legal force to the part thus approved? And yet, where is the difference, in practical effect, between the two cases? The clear logic of the case lies in the axiom, that a bill is an entirety, and a law is the product of the combined, harmonious and unanimous action of the legislative and executive departments of government, each acting strictly within the scope of its constitutional authority, and according to the prescribed forms of the constitutional mandate". 77 Ala. at 600.

This is an established proposition of law in Alabama and the Alabama Supreme Court has invalidated other pretended acts of legislation on this basis; see King

Lumber Company v. Crow, 155 Ala. 504, 46 So. 646 (1908); Mayor and Aldermen of West End v. Simmons, 165 Ala. 359, 51 So. 638 (1910); and Yancy v. Waddell, 139 Ala. 524, 36 So. 733 (1904).

This maxim of law is followed in Arkansas. In Rogers v. State, 72 Ark. 565, 82 S.W. 169 (1904), the Arkansas Supreme Court voided a law wherein the difference between the Senate and House versions of the same bill consisted of the omission of the word "sheriff", and a difference in a fine levied in the act, which difference was "$500.00" in one version, and "$1,000.00" in the opposing version. Since there was no agreement between the two houses, the Court found that there was no law. The same Court also struck a law on this basis in McDougal v. Davis., 201 Ark. 1185, 143 S.W. 2d 571 (1940), where it was shown

that the Senate had amended an act passed by the House, but the House had not concurred in the Senate amendment.

Florida has several cases indicative of this proposition. In State v. Deal, 24 Fla. 293, 4 So. 899 (1888), the Senate passed a law with thirty-one sections in it; the House struck all thirty-one sections and substituted, in lieu thereof, an act with eight sections, and to this the Senate agreed. The enrolled bill had the first eight sections, as agreed by both houses, plus section nine through thirty-one of the original Senate bill and this enrolled bill was signed hy house officers and approved by the governor. The court found, however, that the entire act was void because all parties, both houses and the governor, had not agreed upon the same piece of legislation. In Volusia County v. State, 98 Fla. 1166, 125

So. 375 (1929), reh. den., 125 So. 813 (1930), the legislative journals showed the passage of the same Senate bill, by number, in the House, but the title of that act as passed by the House was radically different. The Court voided the law. In State v. Skaley, 108 Fla. 506, 146 So. 544 (1933), the Senate had adopted an act regulating the practice if "podiatry", while the House had adopted what purported to be the same measure, but which attempted to regulate the practice of "pediatry". The Court held the act invalid. In Hillsborough County v. Temple Terrace Assets Co., 111 Fla. 368, 149 So. 473 (1933), the title to an act as passed by the Senate included the prepositional phrase, "in counties", and the word "last", but the House version of the same act omitted these words; the Court struck the entire act.

In State v. "City of Sanford, 113 Fla. 750, 152 so.193 (1934), both houses of the Florida legislature had adopted an act to amend a "Section 8" of an existing act. However, the enrolled bill, which had been signed by the governor, related to an amendment of "Section 6" of the same existing act. The Court determined that the act was "not an operative law".

"The courts in Illinois will strike a purported act of the legislature if it is shown that all parties necessary for concurrence have not agreed to the same bill. The case of People v. Commissioners State Contracts, 120 Ill. 322, 11 N.E. 180 (1887), is an example of a situation where both houses agreed to the same act, but this act was constitutionally deficient because it lacked an enacting clause; here the Court invalidated the act because the same did not concur with the state

constitution. In People v. Luederes, 283 Ill. 287, 119 N.E. 339 (1918), both houses adopted a bill with amendments; but the enrolled bill sent to the governor lacked the amendments. Because the act proposed by the legislature was different from that presented to the governor, the Court voided the legislation.

The courts in Louisiana, Maryland, and Massachusetts also follow this proposition of law. In State v. Laiche, 105 La. 84, 29 So. 700 (1901), neither house of the Louisiana legislature had agreed upon the precise date on which the act in question would become effective; the Court invalidated the entire act, saying, "There was no concurrence.... of the two houses in the act as promulgated",. 29 So., at 701. In County Commissioners of Washington County v. Baker, 141 Md. 623, 119 A. 461 (1922),

the Maryland Court of Appeals voided an act in a situation where a conference report was submitted to both houses on an act which could not be passed without such conference; the House adopted the conference report but there was no record of the Senate having done so. There not having been a concurrence by both houses of the Maryland legislature, the act was determined to be no law. In Carnegie Institute of Medical Laboratory Technique, Inc. v. approving Authority for Schools for Training Medical Laboratory Technologists, 213 N.E. 2d 225 (Mass., 1965), the Massachusetts Supreme Court struck an enrolled bill which was shown to be different from that enacted by the legislature.

Courts in Michigan and Minnesota follow this rule. In Rode v. Phelps, 80 Mich. 598, 45 N.W. 493 (1890), it was

shown that both houses of the legislature had agreed upon certain amendments to an act, but that the act approved by the governor was different. The Michigan Supreme Court held that act void. In Sjoberg v. Security Savings and Loan Assoc., 73 Minn. 203, 75 N.W. 1116 (1898), the Minnesota Supreme court struck an act passed by both houses of the legislature which did not concur with the state constitution in that the enacting clause had been omitted.

Several cases from Nebraska affirm this proposition. In State v. McClelland, 18 Neb. 236, 25 N.W. 77 (1885), a bill passed by the legislature referred to counties with populations of "15,000" or more. That approved by the governor referred to counties with the populations of "1500" or more. Due to the differences, the Court struck the law. In Weis

v. Ashley, 59 Neb. 494, 81 N. W. 318 (1899), the title of the act passed by the legislature refered to a section "40" of an existing act however, the act approved by the governor referred to a section "48". The Nebraska Supreme Court held that there was no concurrence in the legislaative act and it was therefore void. In Moore v. Neece, 80 Neb. 600, 114 N. W. 767 (1908), it was shown that the Senate passed a bill which was amended in the house. But the Senate refused to concur in the House amendments. The Court found that there was no law.

The Courts in New Jersey and North Carolina are in accord with this rule. In In re Jaegle, 83 N.J.L. 313, 85 A. 214 (1912), the bill as passed by the legislature was different from that approved by the Governor, Woodrow Wilson. The act was

declared not to be a law. In In re Kornbluh, 134 N.J.L. 529, 49 A. 2d 255 (1946), the New Jersey Supreme Court invalidated an act in which it had been shown that both houses had not agreed. In State v. Patterson, 98 N.C. 660, 4 S.E. 350 (1887), the North Carolina Supreme court struck an act which did not have an enacting clause.

This proposition of law applies in Oregon and Tennessee. In Oregon business and Tax Research, Inc. v. Farrell, 176 Ore. 532, 159 P. 2d 822 (1945), the bill as adopted by both houses was different from the bill presented to and approved by the governor. Because there was no concurrence, the act was held not to be law. In Fuqua v. Davidson County, 189 Tenn. 645, 227 S.W. 2d 12 (1950), both houses did not agree on the same act and the act

as held to be void by the Tennessee Supreme Court.

Lastly, the courts in Wisconsin and Wyoming agree with this maxim of law. In State v. Wendler, 94 Wis. 369, 68 N. W. 759 (1896), an act was struck because both houses did not agree upon the same bill. In State v. Wisconsin State Board of Medical Examiners, 172 Wis. 317, 177 N. W. 910 (1920), the difference between the two houses in an act consisted merely in the words "and" and "or"; however, the act was found not to be law on the basis of the failure of both houses to concur with this crucial word. In State v. Swan, 7 Wyo. 166, 51 P. 209 (1897), the Supreme Court of Wyoming invalidated a legislative act approved by the governor.

While cases from every jurisdiction are not cited above, this survey on this

point not being exhaustive, the proposition of law, that both houses of a legislature and the governor must agree to the identical piece of legislation before such may become law, is well supported by authority. While in many of the above cases the difference between the two legislative houses on a given bill or the differences between a bill enacted by both houses and that which is submitted to the governor are great, many of the above cases disclosed situations where the differences are minute. In any event, it is clear that state courts insist upon absolute identity between the acts adopted by both houses of a legislature and between the act adopted by both houses and that submitted to the governor. If there is a lack of concurrence among all the bodies which are involved in the legislative process in reference to a particular legisla-

particular legislative act, then it will be determined that there is no law. The Petitioner has shown above that state courts uniformly, if not universally, hold that questions involving the adoption or ratification of an amendment to a state constitution are considered to be judicial and not political issues. Further, the Petitioner has shown that state courts insist, in reference to ordinary legislative acts, upon absolute and complete concurrence among all parties involved in the adoption of legislation. The demonstration of this principle of law in reference to ordinary legislation has directed application to the question of the adoption of constitutional amendments. If such stringent standards of concurrence are required in the enactment of legislative acts, then it naturally follows that the same or an even more demanding stand-

ard is required in the process of adopting a constitutional amendment. In the one case located by the Petitioner, the Iowa case of Koehler v. Hill, supra, this proved to be true. It is from these legal principles derived from state cases that the Petitioner draws an analogy to identical situations at the federal level.

It is the contention of Petitioner herein that the Sixteenth Amendment to the U. S. Constitution was not ratified by the requisite number of states as required by Article V. of the Constitution. Further, Petitioner contends that the taxation of the "incomes" of private individual citizens by Congress based upon power acquired by Congress through this amendment is nonexistent. Logically, if there is no valid Sixteenth Amendment, then it follows that there is no valid Congressional enactment through which the "incomes" of private in-

dividuals can be taxed.

The history of the taxation of "incomes" and a full treatment of the genesis of the Sixteenth Amendment is a separate issue and thus beyond the scope of this brief. However, a brief mention of the origin and n cessity of this amendment is essential to properly address the issue under consideration. After considerable debate, Comgress adopted an income tax on August 27, 1894; see 28 Stat. 509. The constitutionality of this act was subsequently tested and found wanting in Pollock v. Farmers Loan and Trust, 157 U.S. 429, 15 S. Ct. 673, reh. den. 158 U.S. 601, 15 S. Ct. 912 (1895). Having the desire to tax "incomes" but lacking the power to do so, Comgress began in 1909 debating an amendment which would circumvent the ruling of the Supreme Court in Pollock, supa. The first such attempt was

Senate Joint Resolution 39 and its purpose was to repeal the constitutional regulation of apportionment for all direct taxes This resolution was defeated, so the Senate proposed Senate Joint Resolution 40, which eventually became the Congressional Sixteenth Amendment proposition. After this resolution was allegedly ratified by the states in February, 1913, Congress adopted an individual income tax act in October, 1913. From this income tax act of 1913 has evolved the current federal income tax as embodied in the 1954 Internal Revenue Code, 68 A. Stat., as amended.

Shortly after the imposition of the 913 income tax act, a challenge was made to the construction of the Sixteenth Amendment. In Bushaber v. Union Pacific Railroad Company, 240 U.S. 1, 36 S. Ct. 236 (1915), it appears that the Supreme Court construed the income tax authorizd by this

alleged amendment as an excise. But, later interpretation and construction of Brushaber contradicts the position that the income tax is properly an excise tax. In Jacobs v. Gromatsky, 494 F. 2d 513 (5th Cir., 1974), is was stated that the power to tax incomes arises from this alleged amendment. In Lonsdale v. C. I. R., 661 F.2d 71 (5th Cir., (1981), the Court expressly addressed Brushaber and stated that the power to tax incomes of individuals was derived from the Sixteenth Amendment. And in Parker v. C. I. R., 724 F. 2d 469 (5th Cir., 1984), the Court construed the holding in Bushaber as follows:

> "The Supreme Court promptly determined in Bushaber.... that the sixteenth amendment provided the needed constitutional basis for the imposition of a direct non-apportioned income tax",
>
> 724 F. 2d, at 471.
>
> "The sixteenth amendment merely eliminates the requirement that

the direct income tax be apportioned among the states",
724 F. 2d. at 471.

Thus, from the above authorities, it appears that the courts have concluded that income taxes are direct and the Sixteenth Amendment merely eliminated the constitutional apportionment regulation for this one specific direct tax; further, it is clear that the same courts have determined that the source of this taxing power is the Sixteenth Amendment. It naturally follows that the voiding ot this amendment would deny to Congress, in the absence of apportionment, the power to tax the "incomes" of a private individual, such as the Patitioner.

The power to amend the United States Constitution is found in Article V thereof which Article is basically a more expanded version of the amending clause of the Articles of Confederation entered into by

the original thirteen states of our nation on March 1, 1781. Under Article XIII of the Articles of Confederation, amendments to the same were to be proposed by Congrewss and confirmed by all state legislatures. This method of amendment in addition to three other methods is found in Article V, the only exception being that only three-fourths of the states are necessary to ratify an amendment.

The Philadelphia Convention of 1787 was called for the express purpose of amending and revising the existing Articles. However, while this Convention met, it became apparent that an entirely new constitution was needed. As the body of this new constitution developed over the summer months of 1787, the members of the Convention devoted time to providing a method for the adoption of amendments to the revolutionary constitution the Conven-

tion was to ultimately propose. For the sake of brevity, the work of the Convention on Article V is carefully recounted in the excellent law review article of Paul Scheips entitled, " The Significance and Adoption of Article V of the Constitution," 26 Notre Dame Lawyer 46 (1951). When the Convention completed its work, it was decided that the new constitution would not be adopted via the method set forth in the Articles and, instead, it was proposed that state conventions would ratify the new constitution instead of the state legislatures. It was further provided that ratification of the Convenion's work by nine states would put the Constitution into effect. Because the U.S. Constitution was adopted by state conventions and not by the method provided in the Articles, it appears that the present Constitution of the United States was

enacted in a bloodless revolution by the people; it also appears that the Articles, being perpetual, may still today be compact among the original thirteen states.

Some events which occurred in the various state conventions considering the ratification of the U. S. Constitution are particularly enlightening to the issue under consideration. The Convention submitted the new Constitution to Congress on September 17, 1787, and Congrss submitted this document to the states for ratification on September 28, 1787. On such submission, advocates and opponents of the new Constitution quickly divided into two separate factions or parties known as the Federalists and the Anti-Federalists. The first state to ratify the Constitution was Delaware, which did so on December 7, 1787. Pennsylvania followed on December 12, 1787, and New Jersey adopted the Con-

stituion on December 18, 1787. On January 2, 1788, Georgia ratified the Constitution, and other ratifications were made by Connecticut on January 9, 1788, and Massachusetts on February 6, 1788. Massachusetts was the first state to make a suggestion regarding proposed amendments to the new Constitution. Maryland thereafter followed with its ratification on April 28, 1788. After these seven states ratified, South Carolina ratified the Constitution on May 23, 1788, thus making it the eighth state to ratify.

By June of 1788, only one additional state was needed to ratify the Constitution and put the same into effect. During this month, conventions were being held in New Hampshire, New York and Virgina, and the Anti-Federalists considered it crucial to secure defeats for the Constituion in these crucial state conventions. The

President of the New York convention was George Clinton, a known Anti-Federalist. Alexander Hamilton was a delegate to the New York Convention and James Madison was a delegate to the Virginia Convention. In the correspondence between these two advocates of the Constitution, faithfully reprinted the The Works of Alexander Hamilton by Henry Cabot Lodge, it is readily seen that the Anti-Federalists sought, failing a vote against ratification, to secure the legal equivalent thereto by securing a ratification based upon conditions. In Hamilton's letter to Madison dated June 21, 1788, Hamilton stated that, "The object of the party at present is undoubtedly conditional amendments;" the party referred to being the Anti-Federalists. On June 22, 1788, Madison wrote to Hamiltonb to inform him of the debate of the Virginia Convention.

Madison therin referred to the actions of the opponents of the Constitution and stated, "The opponents will probably bring forward a bill of rights, with sundry other amendments, as conditions of ratification." On July 8, 1788, Hamilton wrote to Madison again and mentioned the problem in the following fashion:

> "Different things are thought of -- conditions precedent, or previous amendments; conditions subsequent, or the proposition of amendments, upon condition that if they are not adopted within a limited time, the State shall be at liberty to withdraw from the Union; and lastly, recommendatory amendmends. In either case, constructive declarations will be carried as far as possible."

This envoked a response from Madison to Hamilton wherein Madison stated that conditional ratification was the equivalent of rejection:

> "My opinion is, that a reservation of a right to withdraw, if amendments be not decided on under the form of the Constitution

> within a certain time, is a conditional ratification; that it does not make New York a member of the new Union, and consequently that she could not be received on that plan. Compacts must be reciprocal -- this principle would not in such a case be preserved. The Constitution requires an adoption in toto and forever. It has been so adopted by the other states. An adoption for a limited time would be as defective as an adoption of some of the articles only. In short, any condition whatever must vitiate the ratification ..... The idea of reserving a right to withdraw was started at Richmond, and considered as a conditional ratification, which was itself abandoned as worse than a rejection."

Not withstanding the manevering by the Anti-Federalists, New Hampshire ratified on June 21, 1788, followed by Virginia on June 26, 1788, New York on July 26, 1788. These states ratified the Constitution without any condititons, but did make many suggestions regarding amendments to the same. With the adoption of the Constitution by these states, the requisite number necessary to form a national government

was achieved.

Lester B. Orfield is perhaps the most knowlegeable scholar of Article V of the Constitution, and in his review article entitled, "the Precedure of the Federal Amending Power", 25 Ill. Law Rev. 418, at p. 437, he mentioned the above problem of conditional ratification of the Constitution. Orfield noted that the view of Hamilton and Madison was to the effect that a conditional ratification was the equivalence of a rejection. This view was accepted by the state conventions, "and as a result each state accepted the Constitution with no reservations, the obligation to adopt the Bill of Rights being wholly moral". Jameson, in his work entitled A Treatise on Constitutional Conventions, 1887 edition, at p. 629, also noted this very same problem of conditional ratification. He recounted this

situation and reached a conclusion based thereon:

> "There are, touching conditional ratifications, some precedents from the early days of the republic. When the Constitution was submitted to the States, in 1788, many of them were inclined to append conditions to their ratifications: but, upon full discussion by the best minds of that time, Hamilton, Madison and others, who doubted both the validity and expediency of such ratifications, the same were made absolute, though with an understanding that amendments should be early adopted to cover the points embraced in the conditions; an under-understanding which was carried into effect by the first Congress that met under the Constitution in 1789. The result was, that ten of twelve amendments submitted by Congress were adopted by the States, and became a part of the constitution. All votes, therefore, which do not ratify, or which ratify upon conditions, must stand on the same footing as though they had rejected; and neither they nor the States casting them are to be counted save for the purpose, as we have said, of fixing the proportional number of States necessary to ratify the amendment."

It must also be noted that while Madison stated in his letter to Hamilton quoted above that conditional ratifica-

tions were the equivalent of rejection, he further stated that the Constitution had to be adopted "in toto" and no state could ratify a part of the Constitution and reject the remainder. The principle of law to which Madison referred was that of Concurrence and he plainly held that all states must agree upon every part of the Constitution as well as the whole. Burgess, in his definitive work entitled Political Science and Comparative Constitutional Law, Vol. 1 at pp. 149, 150, applied this very same principle to Constitutional amendments and held as follows:

> "It may with some reason be held that another point is implied in the precedents, viz: that no commonwealth may insert any change in the proposition of the Congress nor ratify conditionally. Certainly the insertion of any change would be an exceeding of the powers conferred by the constitution of the United States upon the legislatures of the commonwealths in regard to this subject. The

> constitution confers upon them only ratifying powers: i.e., it confers upon them no powers of initiation."

Thus, it is quite obvious that Hamilton and Madison, two of the founding fathers of this nation and semial forces behind the effort to adopt the United States Constitution, clearly discerned a legal principle that has been accepted by the courts of this nation and constitutional scholars alike. This clearly enunciated principle has direct application to the issue under consideration.

Probably the most litigated sections of the United States Constitution involve those found in Article 1, Section 8 and 9, which concern grants of power to Congress and limitations upon the same. In stark contrast, it is fair to say that perhaps the least litigated part of the Constitution is Article V. And, insofar as the present issue is concerned, the decisions

by the Supreme Court involving this Article disclose that this issue has never been totally addressed. Further, when such decisions regarding Article V are compared with other decisions having direct application to this issue, it appears that there is no clear precedent or "polestar" decision which controls the decision of the present issue. Such being the case, reference to state court cases which address this issue is essential.

The first case decided by the U. S. Supreme Court involving the provisions in Article V is Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798). Here a challenge was made to the ratification of the Eleventh Amendment and it was contended that this amendment was void for the reason that the President had not approved the amendment. The Court, in one of the shortest decisions ever made, ruled

against this argument. Justice Chase in a footnote explained that the President was not involved in the amendment process; the issue of a political question was not considered in this case.

Concerning the question of adoption of constitutions as opposed to constitutional amendments, Luther v. Borden, 48 U.S. (7 How.) 1 (1849), is reputed to stand for the proposition that questions involving the adoption of new state constituions are inherently political. This case arose out of Dorr's Rebellion in Rhode Island in 1841 and 1842. During this period, Rhode Island operated pursuant to a constitution. Dorr and his followers held a convention and adopted a new constitution which was submitted to the people for a vote. With the alleged adoption of this constitution, elections for state offices were held and Dorr was elected governor.

Thereafter, Dorr and his followers attempted to gain possession of the state arsenal from the possession of the charter government, but this attempt was unsuccesssful. However, Dorr's effort did result in establishing a political climate in the state which compelled the charter government to call a convention to write a new state constitution. This new constitution was adopted and a new government established pursuant to it. The new government then indicted Dorr for treason and he was tried in a court established according to the provisions of the new constitution. The Rhode Island appellate court held that the question of which constitution was effective, either Dorr's or the one under which the Rhode Island Charter government operated in 1841 and 1842, was a political issue. On appeal, the Supreme Court, pursuant to its practice of

abiding by state court decisions, refused to reverse. The decision in Luther has been distinguished by the state courts, particularly where the issue is the adoption of a constitutional amendment; see Koehler v. Hill, supra, 15 N.W., at 610, 611. And on the same issue regarding adoption of new constitutions, state courts have not followed Luther and have held tht such questions were judicial; see Ellingham v. Dye, 178 Ind. 366, 99 N.E. 1 (1912), and Alabama v. Manley, 441 So. 2d 864 (Ala., 1983).

After the Civil War, the Supreme Court, in two cases concerning the legislative enactment of statutes, held that questions regarding the adoption of such were judicial issues. In Gardner v. Collector, 73 U.S. (6 Wall.) 499 (1868), the question involved the date on which a federal statute became effective. Here,

the Court held that courts were to address issues of this type. A similar holding in reference to a state statute, in Town of South Ottawa v. Perkins, 94 U.S. 260 (1877), was made. Thus, within one hundred years of decisions being rendered by the United States Supreme Court, it had ruled once that the adoption of a law, a state constitution, was a political issue, and had also ruled that adoption of laws, state and federal statutes, presented judicial issues. It seems that precisely what was a judicial issue, and what was a political issue, involved ephemeral, nebulous concepts. What followed certainly did not clarify the problem.

In Field v. Clark, 143 U.S. 649, 12 S. Ct. 495 (1892), the controversy before the Court concerned the enactment of a fedral statute. Here the Senate and House journals disclosed the entire language of

a statute adopted by both houses; the enrolled bill, however, when compared with the bill set forth in the journals, disclosed that a certain sction of the bill had been omitted. The Supreme Court resolved the validity of this act by adopting the bill rule, which precludes reference to legislative journals to determine the passage of a legislative act.

Cases entitled to great precedential value are those which are presuasive in reasoning, based upon estabilished authority, and establish a trend in resolving a particular issue with such trend having a life of many years. An example of this is the precedential value of Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524 (1886), which was not reversed until the decision in United States v. Doe, ____U.S.____, 104 S. Ct. 1237 (1984). If Field v. Clark, supra, set a definitive trend in the law,

it seems that the court would have at least let a few years pass before it carved out an exception to this rule. But this the Court did not do in reference to Field v. Clark, which was decided on February 29, 1892. On the very same day that Field v. Clark, was rendered, the Supreme Court, in the very next case decided, seems to have thrown the enrolled bills rule out the window. In United States v. Ballin, 144 U.S. 1, 12 S. Ct. 507 (1892), the issue concerned whether an act of Congress had been adopted. Specifically, the journal of the House showed that 212 members were present when the bill in question was submitted for a vote, and this number was a quorum. However, the precise vote on the bill was 138 yeas, 0 nays, and 189 not voting; of the number not voting, 74 members were present. The Court decided this case by holding that a

majority of a quorum was all that was necessary to adopt an act. The question naturally arises as to the precedential value of Field v. Clark, supra, especially when the Court creates an exception to the enrolled bill rule in the immediately following case. These two cases only further clouded the distinction between political and judicial issues.

Of all the amendments to the United States Constitution, it was the Eighteenth and Nineteenth Amendments which created more litigation in reference to their ratification than any others to date. Perhaps the first case challenging the Eighteenth Amendment before its ratification was Ohio v. Cox, 257 F. 334 (W.D. Ohio, 1919). Here, the suit involved an effort to enjoin the Governor of Ohio from conveying the Congressional resolution proposing this amendment to the Ohio legisla-

ture, and the challenge was based upon the fact that two-thirds of the entire membership of both houses of Congress had not voted in favor of the resolution, while those who had so voted were two-thirds of a quorum. The Court did not grant the relief sought in the suit and held that such issues could be raised later after ratification of the amendment.

At the time of the submission of the Eighteenth Amendment to the states for ratification, several states had provisions for ssubmittng amendments to the voters of the states in initiatives and referenda. In In re Opinon of the Justices, 188 Me. 544, 107 A. 673 (1919), the Maine Supreme Court held that the referendum requirement of the Main Constitution did not apply to federal constitutional amendments; see also Herbing v. Brown, 92 Ore. 176, 180 P. 328 (1919). A

contrary holding was made in Hawke v. Smith, 100 Ohio St. 385, 126 N.E. 400 (1919), which held that the Eighteenth Amendment was subject to that state's referendum requirement. But, this decision was reversed in Hawke v. Smith, 253 U.S. 221, 40 S. Ct. 495 (1920), and the Supreme Court ruled that state referenda laws did not apply to amendments of the United States Constitution. The ratification of the Eighteenth Amendment was not warmly received by manufactures of alcholic beverages, and some states, and this resulted in protracted litigation. In Christian Feigerspan, Inc. v. Bodine, 264 F. 186 (D. N. J., 1920), the challenge to this amendment involved several points. In this case, the subject matter of the amendment was challenged as well as whether Congress had ever considered that the amendment itself was necessary, this

latter challenge being based upon a certain phrase in Article V. Another issue concerned the fact that at least twelve states had referenda requirements which had not been followed in the ratification of this amendment. This suit was dismissed, and the beer manufacturer appealed. This case and several others filed in the original jurisdiction of the Supreme Court resulted in the case of Rhode Island v. Palmer (The National Prohibition Cases), 253 U.S. 350, 40 S. Ct. 486 (1920). Here, the Supreme Court took the extremely unusual course of rendering opinions and simply made several holdings resolving the issues which had been raised. The Court held that a Congressional resolution showing the necessity of an amendment was not required, and it further held that it only took two- thirds of a quorum of both houses to adopt a

resolution proposing an amendment.

Another issue raised in the Courts concerning the ratification of the Eighteenth Amendment concerned the proclamation made by the United States Secretary of State that an amendment had been ratified. In United States ex rel Widenmann v. Colby, 265 F. 998 (1920), aff., 257 U.S. 619, 42 S. Ct. 169 (1921), the Court held tht the Secretary of State was merely performing a ministerial act in making such proclamation and that an amendment became a part of the United States Constitution when ratified by the requisite number states, and not when the Secretary's proclamation is made. The same issue was raised in a habeas corpus petition concerning a man convicted under the National Prohibition Act. In Ex parte Dillon, 262 F. 563 (N. . Cal., 1920), the Court held that the amendment became ef-

fective upon ratification, and not on the date of the Secretary's proclamation. This holding was affirmed in Dillon v. Gloss, 256 U.S. 368, 41 S. Ct. 510 (1921). While these cases did not place much emphasis upon the proclamation of the Secretary in holding that his act was ministerial and that an amendment was effective upon ratification by the required number of states, the Supreme Court, in Leser v. Garnett, 258 U.S. 130, 42 S. Ct. 217 (1922), in a challenge to the Nineteenth Amendment, held that such proclamation was conclusive upon the courts. The decision in Leser is contradictory to those in state courts on the same point; see State v. Swift, 69 Ind. 505 (1880); Hammon v. Clark, 136 Ga. 313, 71 S.E. 479 (1911); and Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963 (1912).

The Eighteenth Amendment was later

repealed by the Twenty First Amendment, which was ratified by state conventions. But, before the demise of the Eighteenth Amendment, the Supreme Court was faced with the question of whether that amendment should have been ratified by state conventions. In United States v. Sprague, 282 U.S. 716, 51 S. Ct. 220 (1931), the lower court had dismissed an indictment on the basis that the Eighteenth Amendment was void as it had not been raified by state conventions. this decision was reversed and the Supreme court held that Article V granted to Congress the power to select the mode of ratification, and Congress could choose such ratified by either the state letgislature or state conventions.

In June, 1924, Congress proposed an amendment to the Untied States Constitution known as the "Child Labor Amendment."

The Congressional resolution so proposing the amendment did not contain a time frame in which the amendment should be adopted. This amendment was never popular and this explains why it is not a part of our United States Constitution; However, it still spawned litigation. In Wise v. Chandler, 270 Ky. 1, 108 S.W 2d 1024 (1937), the Kentucky legislature had previously rejected this amendment in 1926. In 1937, the same body adopted this amendment, and this suit resulted in a challenge to such ratification. Here, this Kentucky Court held that the first action by the legislature on an amendment, be it ratification or rejection, precluded further action. As an additional buttress to this decision, the Court found that more than one-forth of the states had already rejected the amendment and this made the amendment no longer available for consi-

deration. In contrast with this decision, the Kansas Supreme Court made different holdings in Coleman v. Miller, 146 Kan 390 71 P. 2d 518 (1937), in reference to the same amendment. Here, the Kansas legislature had rejected this amendment in 1925, but had allegedly reconsidered and ratified it in 1937. In the Kanas Senate, the vote on this ratification resolution was 20 in favor and 20 opposed; the Lt. Governor cast the deciding note in favor of the amendment. The Court held that a subsequent Legislature could ratify an amendment notwithstanding previous rejection, and that the Lt. Governor could cast the deciding vote. It further held that the lapse of time since the pendency of the amendment did not preclude ratification. With the decisions in Wise and Coleman being opposite on the same issues, it was natural for the Supreme Court to

hear these cases.

The Supreme Court granted cert to Coleman, and its ultimate decision in Coleman v. Miller, 307 U.S. 433, 59 S Ct. 972 (1939), was clearly the result of compromise in conference. Faced with authority pro and con on the point of a state doing both rejection and ratificaion of an amendment, the Court took a safe course of action and held that such question was political; see first full paragraph at 307 U.S., at 450. In reference to an amemdmemt being void for lapse of time, the Court took the same safe approach to this issue and ruled that its resolution was also a political question. By examining the way the Justices decided this case, much can be learned about the real merit of the case itself. Only Frankfurter, Roberts, Black and Douglas believed that the entire amendment

process was exclusively political and involved no judicial questions. However, if these four Justices had their way in deciding the case, they would have held that the legislators had no standing to sue. Arrayed against the opinion of these four were two dissenters, Butler and McReynolds, and the remainder of the majority, Hughes, Stone, and Reed. Thus, Coleman decided that only two issues before the Court were political, and these issues are not the same as those being raised by the Petitioner. Wise was decided in the opinion following Coleman; see Chandler v. Wise, 307 U.s.474, 59 S. Ct. 992 (1939).

Since the decision in Coleman, there have been no other opinions rendered by the Supreme court which directly deal with Article V other than Kimble v. Swackhamer, 439 U.S. 1385, 99 S. Ct. 51 (1978).

Kimble dealt only with an initiative and referendum in the State of Nevada in regards to the Equal Rights Amendment, and is not of any importance to this issue. But, silence in this respect is in no way indicative of a lack of development in the law which affects this issue.

In reference to the issue of what is a political issue and what is a judicial issue, the Supreme Court has made quantum leaps in further defining the precise distinction. Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691 (1962), dealt with apportionment of the Tennessee legislature, and the Court considered at length certain standards for resolving the political-judicial question. Upon resolving that legislative apportionment involved a judicial question the Supreme court proceeded with reapportionment in Tennessee and subsequently in Alabama; see Reynolds v. Sims, 377 U.S.

533, 84 S. Ct. 1362 (1964). The next opportunity for the Supreme Court to consider the distinction between political and judicial issues was in Powell v. McCormack, 395 U.S. 486, 89 S. Ct. 1944 (1969), which dealt with the seating of Adam Clayton Powell in the United States House of Representatives. If there was ever a proper situtation in which Congress could confidently assert the political question doctrine, it was in this case, yet the Court found the issue to be judicial. In this case, the Court definitely went behind the acts of the House to view the proceedings therein. And in the United States v. Nixion, 418 U.S. 683, 94 S. Ct. 3090 (1974), claims of executive privilege and political question were insufficient to stop a subpoena for Richard Nixon's Infamous tapes. Finally, in Goldwater v. Carter, 444 U.S. 996, 100 S. Ct.

533 91979), in a case involving the Presidential abrogation of a treaty with the Republic of China, the opinion was that such issue was judicial, although the precise situation was not ripe for review. In determining that the issue was judicial, the Court followed only three of the criteria set forth in Baker v. Carr, supra concerning what was a judicial issue. The above cases of the Supreme Court which set forth the guidelines for distinguishing political and judicial issues formed the bases upon which two United States District Courts have determined that controversies regarding the ratification of the Equal Rights Amendment were justiciable. In Dyer v. Blair, 390 F. Supp. 1291 (N. D. Ill., 1975), the issue concerned whether the Illinois legislature had adopted E. R. A. The conflict revolved around an Illinois constitutional provision which

termination of lapse of time in reference to adoption of the challenged amendment. The two United States Supreme Court cases which have applicability to the issues raised herein are Dillon v. Gloss, and Leser v. Garnett, supra. Because Philander Knox certified, on February 25, 1913, that the Sixteenth Amendment had been ratified, Leser does have an application. But if Knox's certification is void, then the only question involved is whether the amendment was ratified by the number of states REQUIRED BY ARTICLE V.

A government agent or officer cannot bind the government to an act if he performs such without proper authority or in excess of his authority; see Whiteside v. United States, 93 U.S. 247 (1876). In Continental Casualty Co. v. United States, 113 F. 2d 284 (5th Dir., 1940), cert. den., 311 U. S. 696, 61 S. Ct. 133 (1940),

this rule was succinctly stated as follows:

> "Public officers are merely the agents of the public, whose powers and authority are defined and limited by law. Any act without the scope of the authority so defined does not bind the principal, and all persons dealing with such agents are charged with knowledge of the extent of their authority."
> 113 F. 2d, at 286.

see also Hale County, Tex. v. American Indemnity Co., 63 F. 2d 275 (5th Cir., 1933), cert. den., 290 U.S. 697, 54 S. Ct. 207 (1933), and United States v. Foster, 131 F. 2d 3 (8th Cir.,1942), cert. den., 318 U.S. 767, 63 S. Ct. 760 (1943). And in Bear River Sand and Gravel Corp. v. Placer County, 118 C.A. 2d 684, 258 P. 2d 543 (1953), it was determined that void acts of public officers could not be ratified by the government for whom such worked. Applying these principles to the certificate of Philander Knox makes such

required a three-fifths vote of both houses to ratify a federal amendment. Further, rules in both houses likewise required the same vote. In a lengthy opinion, the Court held that legislative houses could set their own rules for adoption of such an amendment, and since both houses here had rules requiring a three-fifths vote, and since both had adopted the amendment resolution only by a majority, the court held that the Illinois legislature had not ratified the E. R. A. In Idaho's rescission of a previous ratification of the E. R. A. In Idaho v. Freeman, 529 f. Supp. 1107 (D. Idaho, 1981), another challenge to the ratification of E. R. A. was held to be justiciable. Here the question presented to the District Court involved Idaho's rescission of a previous ratification of the E. R. A. ;in a well written, scholarly and lengthy

opinion, the Court analyzed the distinction between political and judicial issues and held that the questions presented were plainly judicial. The Court ruled that Idaho could rescind its previous ratification, and it found that Congress lacked power to extend the period of time for ratification. The appeal of this case was dismissed for mootness; see Carmen v. Idaho, ____U.S.____, 103 S. Ct. 22 (1982).

With the above background of Supreme Court and lower federal court cases dealing with issues concerning ratification of amendments in mind, it now becomes incumbent to consider the issue at hand. The decision in Coleman v. Miller, supra, is not controlling here as the issues involed are not concerned with attempted rejections after ratifications or vice versa; nor do the issues herein involve the de-

certificate void. Knox had before him the Senate and House journals of Kentucky for 1910 which showed that the Senate had twice rejected, by votes disclosed in the journals, this amendment. Notwithstanding this, Knox determined that Kentucky was the second state to ratify. In reference to Minnesota, Knox did not have any resoluton from this state which disclosed the adoption of this amendment; yet Knox held that Minnesota had ratified without any documentation to this effect, and this was in plain violation of the law. Further, Knox knew that eleven states had changed the amendment itself, something which the states had no power to do and this was acknowledged by Knox. Notwithstanding knowledge of the above defects in ratification, among many others, Knox undertook to FRAUDULENTLY CERTIFY that the amendment had been ratified.

The VOID and UNLAWFUL ACT OF KNOX makes his certificate VOID likewise.

Since there is no lawful certificate or proclamation of the Secretary of State, the next question to be answered is whether thirty-six states did in fact ratify this amendment. The Sixteenth Amendment proposed by Congress in Senate Joint Resolution 40 read as follows:

> "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

This proposed amendment was extremely short and had only thirty words in it. However, the required number of states did not concur in all of these thirty words, and this was known to Knox. Omitting changes made in Capitalization, but noting the word and punctuation changes made by the states, the amendment agreed to by

the thirty-six states in this respect reads as follows:

> '___ Congress shall have power to ____ and collect taxes on _____ from whatever _____ derived without apportionment among the several States and _____ ____ ___ census __ _____."

Constitutional Scholars agree that no state may alter or change any word in a proposed amendment; if such is done, it vitiates that state's attempt at ratification . This is a propostiton firmly shown by state court cases. Knox knew this propostion of law, yet he went ahead and made the proclamation that the amendment had been ratified. HIS ACT IS IS VOID AND CANNOT BE RATIFIED ITSELF.

Since the proclamatiOn on February 25, 1913, is conslusively void, the only question remaining is to determine whether thirty-six states did ratify the above amendment. Documentation from the

Secretary of State's office DISCLOSES CONCLUSIVELY THAT THIRTY-SIX STATES DID NOT SO RATIFY THIS AMENDMENT, and therefore the amendment has not been adopted.

Applying the three criteria set forth in Goldwater v. Carter, supra, it is plain that the judiciary of the United States had jurisdiction of this judicial question. With it being settled that the issues herein are not political but judicial, the only requirement left for the Court is to review the evidence. And the evidence plainly discloses that there is no Sixteenth Amendment.